The Central Law Journal.

SAINT LOUIS, AUGUST 17, 1877.

CURRENT TOPICS.

WE FIND in a recent number of the Abingdon *Virginian* a note of a case of considerable importance, if correctly reported. The name of the case is Spotts & Gibson v. Scott. It was recently decided in the United States Circuit Court for the District of Virginia, Mr. Chief Justice Waite delivering the judgment. The defendant, having purchased land in Goochland county, induced the plaintiffs to pay the purchase-money to the vendor, promising to execute a deed of trust to secure the re-payment of the money so paid, as soon as he should obtain a deed of conveyance from the vendor. The defendant obtained the deed, but refused to execute the trust deed, and claimed the land as his homestead-exemption. The court is reported to have held that, inasmuch as the money was paid by the plaintiffs to the vendor, at the request of the defendant, for the purpose of having the land conveyed to the purchaser, the plaintiffs were subrogated to the vendor as to all his rights and liens on and against said land; that the money so paid must be regarded as the purchase-money of the premises, against which the defendant could not assert the homestead exemption.

A NUMBER of civil suits have been brought against the members of the St. Louis whiskey ring by the United States, to recover revenue out of which it was defrauded by the conspirators. That against Mr. William McKee, the principal proprietor of the *Globe-Democrat*, is attracting most attention. The declaration contains 1653 counts, and the aggregate sum demanded is $2,304,200. We are sorry to note a disposition to try this case in advance, by newspaper. The *Globe-Democrat* has so far kept pretty still about it, but committed one indiscretion in re-publishing an article from the Chicago *News*, in which such words as "blackmailer" and "shyster" were freely used, referring to the law-officer of the government.

The government is ably and creditably represented by Mr. William H. Bliss, the U. S. District Attorney. He is a lawyer who abstains from active participation in party politics, and attends with honesty and fidelity to the duties of his office. The bandying of such epithets about him will certainly not help the defendant's case. We may, however, expect in the *Globe-Democrat* a renewal of the indiscriminate attacks upon all lawyers, which filled that journal at a time when Mr. McKee was understood to be disagreeing with some of the lawyers who defended him in the whisky-ring indictment, about their fees.

THE question formerly discussed in these columns (4 Cent. L. J. 588; 5 Ib. 2), whether the intermarriage of negroes and whites in Texas is lawful, came recently before Judge Duval, in *ex parte Lou. Brown* on *habeas corpus*, in the United States District Court at Austin. In delivering his judgment the learned judge said: "No issues of fact are presented by the return. The only question is one of law, arising under the act of the Texas legislature, passed on the 12th of February, 1858. This act forbids any white person to marry a negro, or a person of mixed blood, descended from negro ancestry, to the third generation inclusive, under penalty of confinement in the penitentiary for not less than two nor more than five years. So far as I have been able to discover, there has been no law passed by the State of Texas since the abolition of slavery prohibiting marriage between the white and black races. The only question, therefore, presented before me is, whether this act of 1858 is now in force and operative? My conclusion is that it is not, for the following reasons, among others: Because it was passed in the interest and protection of slavery, before that institution had been abolished, and when the negro was not a citizen of the United States, and because it fixes a penalty upon the white person alone. It is a prohibition based solely upon color, and operating on the white race alone. To say that this statute is now in force would be, as it seems to me, to disregard the effect of the fourteenth and fifteenth amendments of the Constitution of the United States, and the first section of the civil rights bill. I think it infringes upon both. It is unfair and unequal in its operation, because it would visit a heavy penalty upon a white citizen, and none whatever upon a colored citizen, for doing a certain act. Marriage between the two races is wholly abhorrent to my sense of fitness and propriety, and I presume it would be no violation of the constitution and laws of the United States—inasmuch as marriage is but a civil contract, to be regulated by the laws of the several states—were the State of Texas now to pass a law forbidding such marriages, under penalties extending to both races alike. But until this is done I think the matter must be considered as one of taste merely, and left for its control to the potent influence of public opinion. It is ordered that the clerk of this court do forthwith direct the sheriff of McLennan county to discharge said Lou. Brown from further custody, as being deprived of her liberty, under the aforesaid act of the legislature, contrary to the constitution and laws of the United States." This opinion will have considerable weight, as coming from one of the oldest federal judges in commission, Judge Duval having been appointed in 1857.

IN A recent editorial the New York *World* refers at considerable length to the newspaper attacks upon Judge Dillon. "We believe," says the editor, "there are not two opinions in the country among members of the bar competent to be heard in such a case, as to the legal abilities of Judge Dillon and the judicial nature of his mind. Since the days of Story and Kent no man has done more than he to sustain and to advance the reputation of the American judiciary. His fidelity to his

duties on the bench, his indefatigable energy and promptness (no secondary qualities in a judge in these days of accumulating business) and his universally conceded impartiality, have given him a very high rank at home, while by his frequent contributions to judicial literature, and in particular by his now celebrated work on Municipal Corporations, his reputation has been extended to England and to the continent of Europe. That such a man in such a position should be assailed as lacking in integrity, by a journal professedly of no party, or if of any party leaning rather with Judge Dillon himself to Republicanism in politics, is a serious thing. It would have been a lamentable thing if the charge had proved to be well founded. What should be said of it, the charge proving to be baseless, we leave it to our readers to decide. The attack was not made in a direct and formal, but in an indirect and obviously malicious manner, the *Nation* alleging the existence of 'insinuations of a very damaging and scandalous character' against the conduct of Judge Dillon."

"We do not see," continues the *World*, "how any fair and right-minded man can differ with us when we say that it is an act of bad citizenship on the part of a public writer to intimate the existence of 'insinuations of a damaging and scandalous character' affecting the bench of his country, unless he has previously made a thorough investigation of the subject and convinced himself that there are real and grave reasons for regarding such 'insinuations' as grounded in fact. That the *Nation* made no such preliminary investigation was confessed by the *Nation* itself in its very next issue; for in that issue it published a letter from a legal firm in New York, asserting that no ground whatever existed for any such 'insinuations,' and it accompanied this letter with a brief statement to the effect that it had 'never vouched for the truth' of the insinuations to which it had given currency. Quite aside from the character of the particular Judge thus wantonly impugned, it seems to us that the conduct of the *Nation* deserves the severest reprobation, and we find ourselves forced to say this with sincere regret. In these times it is of the greatest public importance that a peremptory stop should be put by all respectable journalists to the dangerous habit of flinging about wild and wanton imputations upon public servants, which has grown upon the country apace since the dispensation of Grantism overcame our politics. So far as Judge Dillon personally is concerned, the course of the *Nation* has led to the publication by him in the St. Louis *Republican* of July 23, of a full and conclusive reply to the 'damaging and scandalous insinations' aforesaid. We are very sorry to see that, in its issue of the current week, for which we have patiently waited, the *Nation* takes no notice whatever of this reply. We lay it before our readers in full this morning, and leave them, after reading it, to judge for themselves whether the most probable explanation of the extraordinary conduct of the *Nation* is or is not to be sought in the following remark with which it wound up its original attack upon Judge Dillon on the 12th of July: 'We take it for granted that his appointment to the supreme bench is out of the question until the charges are disposed of.'"

The New York *Sun*, of a recent date, referring to the same subject, says: "All the important rulings thus far made in the course of the litigation are in writing and reported, and to these Judge Dillon refers in support of his statement, that the charges are not only unfounded and atrocious, but destitute even of plausibility. An examination of the reports which he cites leads us to the conclusion that his conduct has been proper throughout. * * * Of the ability of Judge Dillon there is no doubt; and, in view of his whole statement, the public should not suffer these charges to detract from the equally high reputation he has enjoyed for honor and integrity."

The *Albany Law Journal*, edited by a very learned and judicious lawyer, referring to Judge Dillon's letter to Gov. Reynolds, says: "This was a proper thing for the Judge to do, but it was not needed to vindicate him before either the public or the profession. His reputation as an impartial and capable judge is too well established to suffer anything from malicious charges, even when appearing in and sanctioned by a newspaper of high literary standing. The CENTRAL LAW JOURNAL suggests that, under a proper press law, a person making such attacks as this one, would find himself behind the bars of a prison. We think, however, that a stringent press law is not needed for the protection of an upright judiciary. Slanderous charges against a well-known judge do comparatively little injury, as the public usually attribute them to their true source, namely, anger and disappointment on the part of defeated litigants, and do not believe them at all. Now and then a specific charge may, unless explained, raise a momentary doubt; but an explanation as full and satisfactory as that made by Judge Dillon clears away every shadow of suspicion that even those who are anxious to believe the statements of his maligners may have cherished."

THE *Nation*, in its issue of the 9th instant, makes a tardy reparation for the injury it did Judge Dillon in republishing with approbation and encouragement the unfounded and malicious charges against him. It publishes a very fair summary of the Judge's letter to Gov. Reynolds, and makes no comments, except that his explanation of Mr. Price's connection with the road is satisfactory to a layman. We presume if it is satisfactory to such a layman as the editor of the *Nation* has shown himself to be, it must be entirely convincing to the general public. This statement is perhaps as much as can be expected of a journal which could lend its columns to such an attack. A plain and candid confession of its error would, however, have done much to reinstate it in the public confidence as a fair and unbiased newspaper.

THE LAW OF ESTOPPEL AS APPLICABLE TO MARRIED WOMEN.*

II. ESTOPPEL BY MATTER OF RECORD.

The ordinary application of this branch of estoppel to married women, will perhaps be better understood by a short reference to the general doctrine.

A record, so far as a definition is necessary here, is the official enrollment of the proceedings of a legislative body, or a court of record; but the latter alone will be considered in this discussion. It is said that such a record imports such absolute verity that no person against whom it is admissible (which embraces only parties and privies), shall be permitted to aver against it. Coke upon Littleton, 260*a*. The Duchess of Kingston, Case, 2 Smith's Leading Cases, 488.

The record is, strictly speaking, but the evidence of that which works the estoppel, rather than the thing itself. Hence, when an issue is made and a judgment, decree or sentence is rendered, and a record is made of the judgment, it is the judgment which operates as an estoppel, and not the record; and, therefore, what has been said refers rather to the conclusive effect of the record as evidence of the matter contained in it than that of the matter itself as an estoppel. But as this distinction is abstract and technical, and as by a very well known figure of speech the evidence of the matter and the matter itself are used interchangably, we may not discriminate nicely between the two in this discussion, or at all events we need not more than keep the distinction in mind.

It may be said, then, generally, as to the matters which are evidenced by the records of a court of record, that wherever such a court has jurisdiction of the person and the subject-matter, all matters properly submitted to the court for adjudication, and finally adjudicated, are forever set at rest, and can never be again litigated between the same parties. No authorities need be cited to this proposition, as it is but the correlative of the proposition concerning the conclusive effect of the *record*, which is but the evidence of the matter, as we have seen. And this rule applies not only to the cause of action, but to the matters upon which the cause of action is founded. Outram v. Morewood, 3 East. 342; Doty v. Brown, 2 N. Y. 71; 6 Ib. 137; 14 Ib. 329; 3 Cowen, 120. These general rules, of course, are subject to some qualifications, which we need not discuss here. It may be remarked, however, in passing, that it is the final adjudication or sentence of the court which gives efficacy to the estoppel; for without this no estoppel can arise. But when this is rendered, it is the seal which gives binding effect to all interlocutory adjudications, and renders them as conclusive and binding in their effect as is the matter specially adjudicated in the final judgment, sentence or decree; and it is in the nature of a final adjudication upon the merits to conclude all matters properly in issue between the parties from the commencement to the close of the litigation. And perhaps with few exceptions the rule is settled that not only the matter actually adjudicated, but what might have been properly litigated by the parties within the issues, by the exercise of ordinary diligence, is *res adjudicata*, and can never be again litigated between the parties or their privies. 2 Taylor's Evidence, § 1513; Gould v. E. & C. R. R. Co., 91 U. S. Reports, s. c. 532, and cases cited.

These general principles being stated, we proceed to observe that the effect of a record as an estoppel upon the rights of a married woman, differs in no important particular from that which it would have upon the rights of a person *sui juris*. For while her disability affects the mode of obtaining jurisdiction of her person by the courts in many instances, yet, jurisdiction once obtained, her disability must be set up or it is forever waived, and she is concluded by the judgment of the court, just as any other person would be. McDonald v. Carver 40 Ind., 250; Elson v. O'Dowd, Id. 390; Wagner v. Ewing, 44 Ind. 441; Landsdall v. Douglass, 46 Ind. 522; Vanmetre v. Wolf, 27 Iowa, 341. It was formerly held that a married woman could not appear in court by attorney unless under the protection of her husband or next friend (1 Chit. Pl. 428); but now, where by statute she is permitted to sue and defend in reference to her separate property, she may appear as persons *sui juris* do; and when she is once brought into court by process, or when she brings others into court by the instrumentality of an attorney, as she may do, she is concluded by whatever judgment, decree or sentence is rendered, just as though she were a *feme sole*.

But while this is so, yet if the obtaining of the jurisdiction depends upon power conferred upon an attorney to appear for her as an attorney, and waive process and suffer judgment against her, the court will be without jurisdiction, and whether the power be oral or by warrant of attorney executed in conformity with the statute, a judgment rendered upon the appearance and confession of such an attorney is void and can have no effect as an estoppel. Hinchman v. Roberts, 2 Har., Del. 74; Burton v. Wilden, 6 Hill, N. Y. 242; Pelton v. Stewart, 19 Ind. 233.

But it is said that whenever a married woman has separate powers of action given her by statute, she may assert them in court by appearance in person or by attorney generally, as if sole, where no special statutory method is pointed out. Bishop on Married Women, § 382. But this statement of the principle is perhaps a little too loose. It should be taken, at all events, with this qualification, already mentioned under another head: "Where new rights are conferred upon her, she will be concluded by the exercise of whatever power is *absolutely necessary to the proper enjoyment of those rights, and no further.*" Kantrowitz v. Prather, 31 Ind. 92.

We have already referred to the reasons why a fine operated as an estoppel to asserting after-acquired title, even by a married woman, and no

*Continued from Vol. 4, p. 579.

additional allusion need be made to that subject, other than to say that the effect of a fine being an assurance of record, and really being an adjudication of a court of record having obtained jurisdiction of the persons and the subject-matter in the mode pointed out by law, the record of a fine is an estoppel of the very highest dignity, and, as to married women, governed by the same rules as judgments and decrees in actions and suits generally. 4 Black. Com. 281, 285.

III. ESTOPPEL BY MATTER IN PAIS.

But the most interesting branch of the law of estoppel, as applicable to married women, is that embraced in our third subdivision, viz: Estoppel *in pais*, or by acts and conduct. We shall confine the discussion of this branch of the subject mainly to an answer to the following inquiry: How far can a married woman, holding separate real estate under the statutes, be estopped from claiming title to the same, and thereby be virtually deprived of her title thereto, by acts *in pais?*

There has been much discussion upon this subject in the cases arising under the modern statutes, but there seems but little harmony, but, indeed, much confusion in the authorities upon the question.

But before we proceed to discuss the application of the subject to married women, it were well, perhaps, to have a clear conception of the subject itself. We might premise that this discussion is confined to what are termed *unsolemn admissions*, *extra judicium*, or acts and conduct not connected with proceedings in any court.

In order to create an estoppel *in pais*, *five* things are necessary. 1. The act out of which the estoppel is to arise must have been performed by the party against whom it is to be set up, with full knowledge of his rights. 2. The act must be inconsistent with the right attempted to be asserted, and against the assertion of which the estoppel is invoked. 3. The action of the party alleging the estoppel must have been influenced by the acts or conduct upon which the estoppel is sought to be based. 4. The party alleging the estoppel must have been ignorant of the facts as they really existed, and have believed them to be as represented. 5. It must appear that, if the party sought to be estopped is permitted to deny the matter or thing represented by his acts or conduct, it will operate as a fraud upon the party whose conduct was influenced and who alleges the estoppel. Fletcher v. Holmes, 25, Ind. 469; Wend. Canal Co. v. Hathaway, 8 Wend. 482; Dezill v. Odel, 3. Hill, 215, and cases cited.

This is all the statement of the general principel which we deem necessary for a proper understanding of the subject.

We now proceed to prosecute the inquiry above indicated, under two subdivisions: I. Can a married woman be deprived of the title to her separate real estate by her acts and conduct operating as an estoppel *in pais*, independently of her statutory right to dispose of it by deed? 2. Can she be deprived of her title by acts and conduct amounting to an estoppel *in pais*, where such estoppel is invoked in aid of an unavailing attempt to transfer her title or encumber her estate by contract or conveyance not conforming to the statutory requirements? Upon the first point it is very plausibly argued on the one hand, that, inasmuch as a married woman may not transfer her title to her separate real estate except in the mode pointed out by the statutes, and can not voluntarily be deprived of the same, except in the very mode, that she can not by indirection do that which the law does not enable her to do directly, and this view is sustained by high authority. Rangely v. Spring, 21 Me. 130; Berues v. Call, 10 Allen, 512. But, on the other hand, when we take into consideration that an action will lie, even against a married woman jointly with her husband, for her *tort*, and that the judgment obtained may be satisfied by a levy upon the wife's separate statutory estate, in most, if not in all the states, and that upon this principle an action of deceit will lie against her for her fraud as if she were a *feme sole*, there is little ground to say that in cases where an action would lie against her if she is permitted to commit a fraud, the principle of estoppel *in pais* will not operate against her, and deprive her of title even, rather than permit her to commit a fraud, for which she would be liable in an action, notwithstanding her inability to convey title by another mode than the one pointed out by the statute. For the argument in support of the contrary view, perhaps, proves too much; for a person *sui juris* can only alien his lands by deed, and yet he may lose his title by estoppel *in pais*. And so it seems now to be the better opinion that, where a married woman, by her acts and conduct, independently of any attempt to convey or incumber her lands by deed or other contract, freely and voluntarily induces others to act, in honest ignorance of her rights, in such a manner as would render it *fraudulent* on her part to deny such acts and conduct, by placing the party so acting upon the faith of the same at a disadvantage, and causing him to suffer loss if she is permitted to change her position, she will be *estopped* to assert her rights in contradiction to such acts or conduct, even though it should operate to deprive her of the title to her lands. And so, where she stands by and sees another person expend money upon her lands upon the faith of the honest belief that he has a good title to the same, and in ignorance of her claim, knowing his ignorance and concealing her title, or failing to give notice thereof, she will be estopped to set up her title. Gatling v. Rodman, 6 Ind. 289; Peek v. Hensley, 21 Ind. 344, Law v. Long, 41 Ind. 586; Scranton v. Stewart, 52 Ind. 68; and so of other cases coming strictly within this principle. Connelly v. Branstler, 3 Bush, 702; Cooly v. Steele, 2 Head, 605. But the rulings have been strictly confined to cases which were within the principle of liability of a married woman for tort, and beyond this they have not gone. And so where the acts *in pais* consisted in standing by on the part of a married woman and permitting

her property to be appropriated for a railway, the appropriator knowing her title, it was held that the acquiescence on her part could only operate upon the principle of contract, and her title was not divested. Todd v. The R.R. Co., 19 O. St. 514.

But when we reach the inquiry contained in our second subdivision, we meet the same confusion in the authorities which we noticed in the discussion of estoppel by recital or representation in a deed.

The idea somehow seems to have gained currency that, because a married woman is held by some of the courts to be estopped by matter *in pais*, as we have already seen, by parity of reasoning, wherever it would operate as a *moral fraud* upon her vendee or contractee to permit her to avoid her deed, or other contract, concerning her separate estate, or to limit the operation of the same to the purposes pointed out by the statute enabling her to contract or convey, the principle or analogies of the doctrine of *estoppel in pais* will be applied, and she will be estopped by her deed or contract, aided by her *acts in pais*, though the contract or conveyance be not executed in conformity with the statutes; or, the operation of her deed will be extended beyond the purposes of the statute to prevent *fraud*. No proposition, however, is more fallacious than that the deed or other contract of a married woman can be made operative to bind her separate real property, unless executed in conformity with the statutes enabling her to convey or incumber the same, as the case may be. The fallacy is not even *specious*. The party contracting with her is bound to know that she derives her power to contract or incumber her land from the statutes. He knows her deed or contract not conformable to it is *utterly void*, and there can be nothing in such a case upon which an *estoppel in pais* can operate to give efficiency to a deed or other contract not binding under the statute. And so where a married woman entered into an executory contract for the sale of part of her residence site, received part of the purchase money, and the purchaser went into possession, and built a brick house, and consulted the *feme* vendor as to the location of the windows in his house, and she gave directions as though she recognized the sale, the court refused specific performance of the contract. The vendee knowing her incapacity, it was his folly to trust a promise by a married woman, the fulfillment of which he could not enforce. And though her refusal to convey was a moral fraud, yet, as there was no binding effect in the contract, and as to hold such acts binding by way of *estoppel* would virtually destroy her disability, the purchaser was left by the court without remedy. Glidden v. Strupler, 2 Smith, Penn. 400; Stevens v. Parish, 29 Ind. 260. And even where the married woman had her deed antedated prior to the time of her marriage, thus fraudulently making it to appear that the deed was valid, and it was earnestly argued that, though the deed, without the joinder of the husband, was void, yet the conveyance with the acts *in pais* passed the title by estoppel, the court held that no title passed. Lowell v. Daniels, 2 Gray, 161: thus holding that a misrepresentation as to the legal capacity of the *feme covert* at the time of the conveyance would not enlarge her capacity by *estoppel* even. The doctrine is equally well settled by the English courts, whether the title be held under a deed of settlement expressly pointing out the mode of disposition, or under their recent statutes directing the mode of conveyance. Jackson v. Hobhouse, 2 Merivale, 282; Nicoll v. Jones, 36 L. J. Eq. 554. But while it is, perhaps, well settled by authority that a person dealing with a married woman is bound to know her disability, and that knowing it, he is bound to contract accordingly, and that her power to contract can not be enlarged by her acts *in pais*, so as, even by her fraud, to give validity to her deed, otherwise invalid, and this, notwithstanding the vague, illogical impression we have noted, still there is respectable sanction to the other fallacy above alluded to, viz: that the capacity of a married woman may be enlarged upon the principle of estoppel *in pais*, so as to extend the operation of her deed beyond the necessary effect of the same under the statutes.

An example of such sanction may be seen in King v. Rea, already reviewed. The court virtually insist there that a married woman, having conveyed her land by a deed purporting to pass a fee, and having gotten the purchase-money, must, to prevent a fraud, be held estopped to assert after-acquired title, upon the principle of estoppel *in pais*. See also Shumaker v. Johnson, already discussed. Mr. Bishop, also, by intimation, commits himself to this view (2 Bishop, Married Women, § 490), and cites an English case in support of it, which we have been unable to examine, and can not say whether it sustains him—Jones v. Frost, Law Rep. 7 Ch. Ap. 35. But such a proposition is in utter perversion of the principle governing the conveyance of real estate by married women, already sufficiently discussed. It is but a specious attempt at judicial legislation. Let us examine the proposition for a moment. If a party pay his money, and take a separate deed from a married woman of her land, or if he pay his money and take an executory contract, and the woman refuse to convey the land in one case, or claim the land in the other, the purchaser loses his money, and has no remedy. Wherefore? Because he has wilfully given his money for that which he is bound to know does not bind the woman, and gives him no remedy against her. In the case under consideration the vendee takes a deed which the statute authorizes the woman to make, by which the title, such as she has, flows from her to him; the statute gives it no greater effect. The grantee is bound to know the effect of the deed; he pays his money understanding the same, and knowing he has no indemnity by covenant or otherwise. If the married woman had no title which she conveyed, but afterwards acquired the title, and is neither by common law nor statute *estopped* by covenants or recitals upon the principle of *estoppel* by *deed*, how shall she be bound upon

the principle of estoppel *in pais*? In the former case he has no remedy by estoppel *in pais*, because none of the elements of this class of estoppel arise, except, perhaps, the fraud. And so in the latter; there is not a particle of difference in principle. In the one case the vendee has no remedy, because he takes a void deed—void for want of capacity in the vendor to make it. In the other he takes a good deed, but, as he is bound to know, one which affords him no indemnity in case of a failure of title; whether the vendor or another acquire the title, is a question which cannot affect him. Taking King v. Rea as an example, then, the *feme vendor* and the vendee, as appears, were both ignorant of the want of present title by mere mistake of law; she made no representation by which she could be bound; he could not justly claim to *rely* upon any representation to which she was *not bound* by law; and if it operated as a moral fraud upon him, for her to take money and then claim the land, it is not more so than any other case where a party contracts and pays his money for a conveyance and takes no assurance that he obtains any title. In principle the case in this respect is not distinguishable from Glidden v. Steupler and Lowell v. Daniels, and the English cases cited above. And though there is, perhaps, a wrong in morals, yet it is *damnum absque injuria*, and arises out of the disability of the married woman.

If these settled rules of property are wrong, the only proper remedy is with the legislature, and not with the courts; and all attempts to remedy the inconvenience arising out of particular cases or classes of cases by infringing well-settled principles are pernicious, and but tend to unsettle the law. It is not to be denied that, under the legislation in reference to the rights of married women in the several states, much of it crude and incoherent, and framed by men who generally possess little knowledge even of the extent of the disabilities of the class whom they are seeking to benefit by legislation, these disabilities are, in many instances, perverted and made the instruments of fraud. And so far as is necessary for the protection of parties contracting with married women from the effect of such perversions, consistently with the proper protection of their rights, these disabilities should be removed by legislation, but not otherwise.

CRIMINAL LAW—EVIDENCE OF DEFENDANT.

STATE v. HARRINGTON.

Supreme Court of Nevada, April Term, 1877.

HON. THOMAS P. HAWLEY, Chief Justice.
" W. H. BEATTY, } Associate Justices.
" O. R. LEONARD, }

1. EVIDENCE OF DEFENDANT—COMMENTS ON BY STATE.—Under the statute permitting defendants, in criminal trials, to testify in their own behalf, if the defendant takes advantage of the statute and voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as in the case of other witnesses.

2. MURDER—JUSTIFICATION—BELIEF.—On an indictment for murder, where the defense is a justification of the act, it is error not to permit the defendant to testify that, at the time he fired the shot, he believed himself to be in danger of losing his life.

3. INSTRUCTIONS OF THE COURT BELOW, upon the question of justification, considered.

Jno. R. Kittrell, Attorney-General, and *Robt. H. Lindsay*, District Attorney, for the State; *A. B. Elliott*, and *Wm. Woodburn*, for Defendant.

LEONARD, J. delivered the opinion of the court:

This is an appeal from the judgment of the District Court of Storey County, rendered against appellant December 16, 1876, and from an order of said court denying his motion for a new trial. Appellant was accused and convicted of murder of the first degree in killing one John C. Sullivan, in said county, on or about July 22, 1876. The record contains no formal motion for a new trial, nor are the grounds thereof embodied in the bill of exceptions; but all the errors alleged can be examined in this court on appeal from the judgment.

1. The bill of exceptions shows that, without objection on the part of defendant, one Merrow, at the trial, testified as follows: "I was deputy constable of township No. 1, in this county, at the time this trouble occurred; I made the arrest; I had a conversation with Harrington, the defendant, in regard to the matter; I asked him what he did it for; he told me that Sullivan tore his coat; that is all the reason he gave; that is all he said." Subsequently defendant was called and sworn as a witness. He testified in his own behalf, but did not testify in relation to the matter stated by said witness Merrow. Counsel for the defendant, in his argument before the jury, which preceded that of the distrist attorney, claimed and argued that the statements of witness Merrow were false. The district attorney in his reply, without objection on the part of counsel for defendant or the court, stated to the jury "that, inasmuch as the defendant, when testifying in his own behalf, had not contradicted the statement of Merrow, they must take said statement as absolutely true,—that, therefore, it was true."

The action of the district attorney in so addressing the jury, and of the court in failing to interpose objection thereto, is assigned as error. Appellant also claims the court should have instructed the jury as provided in section 2306, when the defendant declines to testify.

Under the constitution of this state, no person accused of a crime can be compelled to testify against himself; but under the statute, at his own request, but not otherwise, he shall be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. The statute further provides, that in all cases wherein the defendant in a criminal action declines to testify, the court shall specifically instruct the jury that no inference of guilt is to be shown against him for that cause. Comp. Laws, Secs. 2305-6.

Courts have nothing to do with the wisdom or policy of a statute. Their only duty, in a proper case, is to enforce it. Under the statute mentioned, in a case wherein the defendant in a criminal action declines to testify, the court shall specially instruct the jury as prescribed in the act. Certainly, there is nothing in the statute requiring the court to so instruct the jury in a case wherein he does not decline to testify, but, on the contrary, wherein he voluntarily makes himself a witness in his own behalf, as in this case. A defendant on trial in a criminal action, in this state, may plead not guilty, and thereafter sit in silence, or he may, at his option,

testify for himself. If he chooses the latter course, he is to be held and treated, so far as his testimony goes, like any other witness. He can not be cross-examined beyond the subject-matter upon which he has been examined in chief, for the reason that, with him, as with other witnesses, the rules of evidence do not permit it; and, too, because such a proceeding would be compelling him to become a witness for the prosecution against himself. People v. McGungill, 41 Cal. 430. "If he does not choose to avail himself of the statutory privilege, unfavorable inferences can not be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to." Cooley's Const. Lim. 317.

In a note subsequently written, in referring to the text above quoted, Judge Cooley says: "What we intend to affirm by it is, that the privilege to testify in his own behalf is one the accused may waive without justly subjecting himself to unfavorable comments; and that if he avails himself of it and stops short of a full disclosure, no compulsory process can be made use of to compel him to testify further. It was not designed to be understood that in the latter case his failure to answer any proper question would not be the subject of comment and criticism by counsel; but, on the contrary, it was supposed that this was implied in the remark that 'it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it is entitled to.' All circumstances which it is proper for the jury to consider, it is proper for the counsel to comment upon." See, also, State v. Ober, 52 N. H. 462; State v. Cohn, 9 Nev. 179; State v. Huff, 11 Nev. 27; Connors v. People, 50 N. Y. 240. As affecting the right of the jury to consider, or counsel to comment upon, the circumstances, we can perceive no difference between the refusal of defendant to answer a proper question upon cross-examination, and neglecting to testify upon some material matter within his knowledge, proven against him by the prosecution.

The authorities are somewhat conflicting upon the question, whether or not, if the defendant in a criminal case voluntarily testifies, he can be compelled, upon cross-examination to answer any proper question concerning any fact upon which he testified in chief. It being unnecessary to decide the question in this case, we express no opinion upon it.

Our conclusions are, that if the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses.

Nor are the two cases cited by counsel for appellant (People v. Tyler, 36 Cal. 522; People v. McGungill, 41 Cal. 429), opposed to our conclusions. In the first case, defendant did not avail himself of the right conferred by statute, and offer himself as a witness in his own behalf. He did not testify. The district attorney, in his argument before the jury, called attention to the fact that the defendant had not testified in his own behalf, and argued and insisted before the jury that the silence of the defendant was a circumstance strongly indicative of the defendant's guilt. Defendant's counsel objected to this course of argument, and requested the court to require the district attorney to refrain from urging such inference; but the court declined to interfere, and intimated that the law justified the counsel in the course pursued. The district attorney continued to urge before the jury that the silence of the defendant was a circumstance against him, and the defendant excepted. At the close of the argument, defendant's counsel asked the court to instruct the jury that no inference of defendant's guilt should be drawn from the fact that he did not testify in his own behalf; but the court refused to so instruct. The court on appeal, very properly held, upon such a state of the case, that the court below erred in permitting the district attorney to pursue the line of argument to which objection was taken, and especially in refusing to give the instruction asked. In the second case, the defendant offered himself as a witness in his own behalf, and was only asked if he had had certain conversation with one Yates, testified to by said Yates, and he answered that he had not. He was examined no further by his counsel than concerning said conversation, nor was he examined upon any other point, but answered all questions required of him by the court. Upon the argument, counsel for the prosecution commented upon the fact before the jury, that the defendant refused to be cross-examined as to the whole case. Defendant's counsel protested against such comments, but they were continued by permission of the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated, could have been cross-examined as to the whole case. If the court had compelled the defendant to answer beyond the line of legitimate cross-examination, its action would have been error in a double sense: first, in allowing counsel to press in cross-examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of the defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt.

It need not be stated that the facts of the two cases cited, and the one in hand, are so widely different that the former are no authority for appellant in this case. In addition to the foregoing, it is proper to remark that it is apparent to our minds, from the bill of exceptions, that the comments of the district attorney complained of were called out by those of the defendant's counsel in declaring the testimony of witness Merrow to be false. In reply, the district attorney, to sustain the witness, and to show the truthfulness of his testimony, stated that the defendant, although he had an opportunity to do so, had not contradicted the witness. The comments, under the circumstances, were proper.

2. At the trial, one Nelson, a witness for the defendant, testified that just preceding the shooting, deceased had hold of the defendant by the coat-sleeve or shoulder, and that defendant appeared to be trying to free himself; that defendant made a motion as if to strike deceased. Witness then testified as follows: "Sullivan made a motion; I can't tell what he was doing; his back was toward me; he raised his hand up; his elbow appeared to be about that high. [The witness here raised his hand to show, the right hand being high up, opposite his left breast, the right elbow being extended to the right of his body.] I could not see where his hand was, because I was right behind him and a little ways from him."

Counsel for defendant then asked witness the following question, viz.: "What did he appear to be doing with his hand or arm?" The district attorney objected, on the ground that the question was incompetent and irrelevant, inasmuch as it called for the opinion of the witness. The question was clearly incompetent. The witness had already stated all he saw or

knew. He had, by word and act, given the jury and court all the facts in his possession. What else could he say but to give his opinion of what deceased was doing? He was called to testify to facts—not to give opinions or beliefs.

3. Appellant complains of the definition of murder of the first degree given by the court to the jury. We are satisfied that the different instructions given by the court properly defined the crime mentioned, and that the jury could not have been misled thereby. State v. Stewart, 9 Nev. 131.

4. Defendant's counsel asked the court to give the following instruction to the jury: "If the deceased made threats to the effect that he intended to kill, or do the defendant great bodily harm or injury if he did not stop keeping company with Julia Regan, and such threats had been communicated to the defendant; and if, at the time and just previous to the killing the deceased made hostile demonstrations toward the defendant, and the demonstrations and circumstances connected therewith were such as to justify the belief that the deceased intended to carry out his threats, then the defendant would be justified in killing him without retreating."

The court modified this instruction by inserting after the words "hostile demonstrations" the words "or overt act," and added at the end the following: "But if it does not appear that the threats were followed by any overt act, the mere apprehension of danger is not sufficient to justify homicide." As modified, the court gave the instruction to the jury.

As presented, it was erroneous for several reasons. It gave, as the only necessary test of justification, previous threats communicated to defendant, and hostile demonstrations and circumstances connected therewith, before and at the time of the killing, which justified the belief that the deceased intended to carry out his threats. It is plain that many of the necessary elements of justification are wanting in the instruction.

In State v. Stewart, 9 Nev. 130, the court say: "Mere threats, unaccompanied by any demonstrations of hostility, from which the accused might reasonably infer the intention of their execution by deceased, would not justify the homicide. Nor would acts of hostility, however violent of themselves, excuse the slayer. There must be some overt acts or words at the time, clearly indicative of a present purpose to do the injury. The defendant must show either that he was actually assailed, or that he was menaced by the deceased at the time, in such a manner as to induce him, as a reasonable person, to believe that he was in danger of receiving great bodily harm." See, also, State v. Hall, 9 Nev. 58; People v. Scoggins, 37 Cal. 683.

This instruction was also lacking the further and indispensable qualification that the defendant acted under the influence of fears excited by such threats, hostile demonstrations and circumstances, and not in a spirit of revenge.

Appellant claims that the instruction as modified must have conveyed to the minds of the jury the idea that the words "overt acts" meant only such acts as striking or assailing. This view is clearly erroneous. The term "overt acts," as used by the court, meant any acts of the deceased, which manifested to the mind of a reasonable person a present intention on his part to kill defendant, or do him great bodily harm.

If there is any error in the modified instruction, it is because it is too favorable to appellant.

5. The court refused to give the following instruction to the jury, which refusal is claimed as error, to wit.: "If you believe from the evidence that the defendant's life had been repeatedly threatened by the deceased, then the defendant may lawfully arm himself to resist the threatened attack; he may leave his home for the transaction of his legitimate business, or for any lawful or proper purpose, and if on such an occasion he met the deceased, and had reason to believe him to be armed and ready to execute his murderous intentions; and if the defendant, from the threats, any attempted assault previous to the killing, and the circumstances attending the meeting, had reasonable ground to believe, and did believe, that the presence of deceased put his life in imminent peril, then he would not be obliged to wait until he was actually assailed, but may kill, and it will be justifiable. He could not, under such circumstances, hunt the deceased and shoot him down like a wild beast, nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting and the killing of his adversary."

This instruction assumes that, from former threats, the deceased, at the time of the fatal meeting, had "murderous intentions," regardless of the evidence. Such assumption is unwarranted. It would have instructed the jury to justify defendant in shooting deceased, because of "former threats, any attempted assault previous to the killing and the circumstances attending the meeting, if defendant had reasonable ground to believe, and did believe, that the presence of deceased put his life in imminent peril," even though defendant was in the wrong and the first assailant.

It assumes, regardless of any proofs to establish the fact, that deceased had, previous to the killing, attempted to assault defendant. It was properly refused.

6. Next and last, appellant complains of the action of the court in refusing to allow him, when testifying as a witness in his own behalf, to answer the question hereafter stated. The bill of exceptions shows the following: "Counsel for defendant then asked defendant the following question: At the moment of the discharge of the pistol at the deceased did you or did you not really believe that you were in danger of losing your life or receiving great bodily harm? To which question the district attorney objected, for the reason that the question was irrelevant and incompetent, inasmuch as it was the province of the jury to determine whether or not, from the attending circumstances, a reasonable man would believe himself in danger of losing his life; and the court sustained the objection. To which ruling of the court, the defendant by his counsel then and there duly excepted."

Let it be borne in mind that appellant's defense was justifiable homicide. He admitted the killing of deceased, but claimed it was done in necessary self-defense. In order to justify himself he was, by his own proofs, compelled to bring himself within the terms of sections 25 and 26 of the Crimes and Punishment Act, which reads as follows:

"Section 25. Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

"Section 26. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge."

Under the two sections of the statute just quoted, it is evident that, before the defendant could have been justified by the verdict of the jury, it must have appeared to their minds, from all the testimony in the case, not only that the defendant was at the time surrounded by such circumstances as were sufficient to excite the fears of a reasonable person, but also that he really acted under the influence of those fears, and not in a spirit of revenge. It was just as necessary for the testimony to show that his mind was in accord with the last condition stated in section 26, as with the one preceding. In other words, if the jury had been satisfied. from all the testimony in the case, that the circumstances surrounding defendant at the time, were sufficient to excite the fears of a reasonable person, still they could not have justified him by their verdict without being satisfied, from the evidence, that he really acted under the influence of the fears mentioned in the statute, and not in a spirit of revenge. In arriving at the conclusion as to whether a defendant, accused of murder, really acted under the influence of such fears, and not in a spirit of revenge, jurors oftentimes would, and properly, too, consider that, even though the circumstances were sufficient to excite the fears of a reasonable person, yet that he did not so act, but that he really acted in a spirit of revenge. They might conclude that the circumstances, ostensibly sufficient to justify his fears as a reasonable person, were, in fact, made so by the defendant for the sole purpose of justification, when really he acted in a spirit of revenge.

Suppose two men have for a long period been deadly enemies, and at last one kills the other under circumstances apparently sufficient to justify the fears of a reasonable man; certainly, under such circumstances, any jury would more readily believe that the homicide was committed in a spirit of revenge, than if they had always been friends prior to the killing. In this case, the killing having been admitted by defendant, and the burden of proof having been upon him, in some manner to show that he really acted under the influence of the fears stated in the statute, and not in a spirit of revenge, he had the indisputable right to strengthen other testimony by his own, under oath, in the presence of the jury, that at the time of the fatal shot he really believed his life was in danger, or that he was in danger of receiving great bodily injury. It was a fact proper be be considered and weighed by the jury, as to what the condition of his mind was at the time; and who so well knew in what spirit and with what motive he acted as defendant?

It is true that a defendant in a criminal action has inducements to misstate the motives that actuated him, as well as his beliefs at the time. So he has relative to any other fact. The law, however, does not make that a reason why he shall not be allowed to make his statement to the jury, upon all matters concerning which he has a right to testify, and let the jury judge of the veracity of his testimony.

Besides, several of the instructions given by the court make it a prerequisite to defendant's justification, that he "did believe" he was in danger of losing his life or receiving great bodily harm, as well as that, as a reasonable person, he had reason to so believe.

The court instructed the jury in part as follows: "The law of self-defense is founded on necessity; and in order to justify the taking of life upon this ground it must not only appear that defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily injury, but it must also appear to the defendant's comprehension, as a reasonable man, that to avoid such danger it was necessary for him to take the life of the deceased.

"If you believe from the evidence that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, and you further believe that it also appeared to defendant's comprehension, as a reasonable man, that to avoid such danger it was necessary for him to take the life of John C. Sullivan, such killing would be in self-defense, and you should acquit the defendant."

Thus the jurors were instructed, as the statute provides, that one of the necessary elements of justification was that he did so believe.

We are entirely satisfied that, for the purpose of showing the condition of his mind at the time, and to establish one of the necessary conditions of justification, defendant had the right to answer the question objected to, and that it was for the jury to consider it like all other testimony proper to be given in the case.

In People v. Farrell, 31 Cal. 576, the court say: "The rule that the intent must be inferred from the acts and words of the party, had its foundation in necessity created by the rule which excluded parties in interest from the witness stand. That necessity is now removed by the abrogation of the rule which created it, and the legal tenet that actions must speak for themselves, and words furnish their own interpretation, is much modified, if not wholly abrogated, by the recent innovation upon the common law, by which parties are allowed to testify in their own behalf. Before that time, there was no way of ascertaining the motives and intentions of parties, except by inference from their acts and sayings; and all experience shows that they may frequently, if not at all times, prove very imperfect guides. * * * It is no answer to say that this enables a party to substitute a false motive for a true one, or to convert words spoken in one sense into another. If the argument proves anything, it proves too much, and shows that the radical change which has been made is in all respects founded in folly rather than wisdom. For the truthfulness of parties when upon the witness stand, we must depend, as in the case of other witnesses, upon the obligation of their oaths and their reputation for truth and veracity. If these can be relied upon for the truth of statements made in reference to acts and words of which the eye and ear may take notice, they may, for the same reason, be accepted as guarantees for the truth of statements made in respect to motives and intents of which the mind or inner man alone can take cognizance. Nor is there, in our judgment, any well-grounded reason for apprehending that this rule will obstruct rather than advance the ends of justice. There is no more danger of imposing upon the jury falsehood or pretense in respect to motives and intents, than there is of doing the like in respect to visible or external circumstances. The jury can as readily distinguish between the false and true in respect to the former as the latter. If the motive or intent assigned is inconsistent with the external circumstances, it must be discarded as false. If, on the contrary, they are consistent, there is no reason why they may not be true." See, also, State v. Stewart, 9 Nev. 132; People v. Williams, 32 Cal. 285; Sec. 305, vol. 1, Bish. Crim. Law, Sixth ed.

For this error, the judgment of the court below is reversed and a new trial ordered.

LIFE INSURANCE—CIRCULARS.

STEEL v. ST. LOUIS MUTUAL LIFE INSURANCE COMPANY.

St. Louis Court of Appeals, December Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

EVIDENCE—CIRCULAR—NON-FORFEITING POLICY.—In an action upon a policy of life insurance, evidence of the wholesale issuance by the defendant of a circular apprising its policy-holders that its policies are to be made non-forfeiting so far as the "premium reserve" will make them so, is held admissible in evidence as tending to show that the insured failed to pay his last premium by reason of reliance upon the promises of such circular; and if the jury, find the fact to be so, the policy is not to be forfeited during such period as the "premium reserve" will cover.

BAKEWELL, J., delivered the opinion of the court:

This is an action upon a policy of insurance dated February 8, 1861, whereby, in consideration of $56.71 paid by plaintiff to defendant, and of an annual premium of the same amount to be paid on the 8th of February in every year, defendant assured the life of Stewart Steel, Jr., plaintiff's husband, for the sole use of plaintiff for the term of his natural life, in the sum of $3,000. The policy provides that, in case of failure to pay the annual premium on the days mentioned, defendant shall not be liable for the sum insured, and the policy shall cease and determine. The policy remained in full force up to February 8, 1873. During a period of years prior to that time, defendant printed and distributed a number of circulars, of which a copy, marked "Exhibit B," is attached to the petition, containing the following advertisement: "This company, having no desire to reap an advantage from the misfortunes of such of its members as may, through adverse circumstances, be unable to meet promptly their annual premiums, has made its annual life-policies, now in force and hereafter to be issued, non-forfeiting, by extending the full amount of the insurance over such period of time as the 'premium reserve' or 'value of the policy' will pay for, applied as a single premium for temporary insurance." This statement was followed by a table illustrating the plan. It also provided that the indebtedness, if any, either for notes or premiums, standing against the policy, was to be deducted from the reserve, and the balance only applied as aforesaid.

Stewart Steel, Jr., was the agent of plaintiff for the payment of premiums, and was so recognized by defendant, and paid all the premiums duly for twelve years and up to February 8, 1873. The premium for that year was not paid. Stewart Steel, Jr., died in St. Louis on the 18th of September, 1873. It is alleged by plaintiff, in her petition, that defendant distributed thousands of copies of this circular, and especially among the holders of its annual life-policies; and that, in this way and in other ways, notice was given to Stewart Steel, Jr., agent of plaintiff, by defendant, of the assurance contained in said prospectus; and that Stewart Steel, acting for plaintiff while said policy was still in force, having notice of said assurance and stipulations of defendant, relied upon them, and therefore did not pay the premium due February 8, 1873. It was further alleged, and was admitted on the trial, that the balance of reserve on the policy sued on was sufficient, if applied according to said notice, to carry the insurance for the amount named in the policy beyond the day of the death of Stewart Steel. The petition also alleges that by reason of the premises, defendant waived the condition of the policy as to forfeiture, and that the policy was in force at the date of Steel's death. The answer sets up, as a defense, the condition as to forfeiture by non-payment of the premium due on the 8th of February, 1873. The reply sets up again the allegations of the petition as to the notice to Steel, and pleads them by way of estoppel. Another distinct matter of defense is pleaded, but, as it was not entered upon at the trial, it is not necessary to set it out.

On the trial, plaintiff introduced as witnesses the secretary, receiving teller, and stationery clerk of defendant, by whom it was proved that the circular, containing the notice before referred to, was issued in January, 1869; that about fifty thousand copies of it were distributed before January, 1870; that it was published in January, 1870, and in July, 1870; that it was distributed about St. Louis by the soliciting agents of defendant, and sent out to agents abroad; that it lay on the counters and desks in the office of defendant for distribution, in piles which were received every day. Over a hundred thousand copies thus passed through the hands of the stationery clerk, whose duty it was to keep the office and agents supplied with them during the eighteen months following January, 1869. These circulars were also placed on the desk where premiums were received, that they might be taken by the customers of defendant. The premiums on the policy sued on were in every case paid at the office, and though the witnesses can not recollect whether or not these premiums were on every occasion paid at the office of defendant by Stewart Steel in person, there is evidence that he did, on two occasions after the issuing of the circular in February, 1870, and February, 1871, pay the premium himself over the counter, on which a pile of these circulars was lying, to be taken by those doing business at that counter. Extraordinary efforts were used to bring actual notice of the contents of this circular to every person having dealings with defendant. There is, however, no witness who states that Stewart Steel, to his knowledge, had in his possession or read the circular, or the notice which was a part of its contents. There was no attempt to show, and it does not seem to be pretended, that the proposition set forth in the circular was ever withdrawn or modified.

At the close of plaintiff's case, defendant asked an instruction in the nature of a demurrer to the evidence, which was refused. Defendant then read in evidence the premium note of Stewart Steel, dated February 8, 1872, at twelve months, for $154.30, to the order of defendant, for part premium then due on the policy in suit, the execution of which was admitted by the pleadings. The following instructions were given at the instance of plaintiff: "1. If, from the evidence, the jury believe that the policy sued on was taken out in plaintiff's name and for her benefit by Stewart Steel, and that he was her representative for the purpose of providing for the payment of the premiums thereon; and if the jury are further satisfied from the evidence, or the circumstances given in evidence, that, before any failure to pay the premium due February 8, 1873, defendant distributed to and among the holders of its annual life-policies, thousands of copies of the prospectus or circular given in evidence in this case, and that said Stewart Steel knew of such circulars and relied thereon, and upon the announcement and assurances therein contained, and that, so relying thereon and being influenced thereby, and being plaintiff's agent in that behalf, the said Stewart Steel did not pay said premium due February 8, 1873; then, it being admitted that said policy is an annual life-policy, this action will not be defeated by reason of the non-payment of said premium, provided the jury are further satisfied that the premium reserve or value of said policy, after deducting therefrom any indebtedness

standing against said policy, was sufficient on February 8, 1873, if applied as a single premium for temporary insurance, to extend said insurance beyond the day of the death of Stewart Steel. 2. If the jury find for the plaintiff, they will assess her damages at the amount of the policy less the premium due February 8, 1873, and the amount of the premium note unpaid, with interest on said note from its date to February 8, 1873, at the rate of six per cent. per annum, with interest on the remainder at the rate of six per cent. per annum from February 18, 1874. 3. The jury are instructed that it is admitted by the pleadings that all things relating to the payment of premiums on the policy in suit, except the premium due February 8, 1873, were done by Stewart Steel, for and on behalf of plaintiff; that plaintiff was the lawful wife of said Steel at all times named in said policy, up to the time of his death; that said Stewart Steel died on November 18, 1873, and that due and satisfactory notice and proof of said death of said Stewart Steel was given defendant, and that more than ninety days elapsed before the commencement of this suit." To the giving of these instructions defendant excepted.

The following instructions were given at defendant's instance: "1. The jury is instructed that the circular introduced by plaintiff can have no legal effect to in any way affect the terms of said policy sued on, unless it is proved to the satisfaction of the jury that such circular was actually received by the plaintiff or her deceased husband, either directly or by her agent, and that she or her agent relied upon the same, and was induced thereby to omit payment of the premium on the policy sued on, payable February 8, 1873. 2. The court instructs the jury in this cause, that, to entitle the plaintiff to recover in this action, the jury must be satisfied from the evidence that deceased received the circular introduced in evidence by plaintiff, but that he also relied on the terms and conditions of said circular, and, relying thereon, and not for any other reason, failed to pay on the policy due and payable February 8, 1873."

It is admitted by the pleadings that no part of the premium due February 8, 1873, was ever paid by plaintiff or Stewart Steel, her husband. Defendant asked the court further to instruct that the circular introduced by plaintiff had no legal effect; that if the premium due February 8, 1873, was not paid, then plaintiff could not recover, and that the circular could have no legal effect, unless plaintiff or her agent assented to them, and gave notice to defendant of such assent before February 8, 1873. These last instructions were all refused, and defendant excepted. There was a verdict and judgment for $3,116.60; and a motion for a new trial having been filed and overruled, and all exceptions saved, the cause is brought here by appeal.

1. It seems to have been urged below that the damages were excessive; but that point is not made in argument here, and it would seem that, if plaintiff is entitled to recover at all, the verdict is not too large.

2. Witnesses, against the objections of defendant, were permitted to refer to the circular issued in 1870, whereas the petition speaks only of the circular of 1869. But, independently of the fact that the objection to this evidence was not made in a manner sufficiently specific to save the point, the evidence as to either circular stood on the same footing; and, if the testimony as to the circular of 1869 was competent, that as to the circulars of January and July, 1870, was equally so, for the later circulars were shown to be mere re-issues of the first, and all were published while this policy was in force, and before February 8, 1872. It will appear from what we shall proceed to say, that we regard the testimony as to these circulars as competent and material.

3. We see nothing in the giving or refusing of instructions of which defendant can complain. The court put it to the jury to determine from the evidence whether Stewart Steel knew of, relied on, and acted upon the assurance in the notice contained in the circular. The jury found that plaintiff or her agent did receive the circular of defendant, and relied upon the same, and was thereby induced to omit the payment of the premium due February 8, 1873; and we think there was evidence from which the jury might so find. In Wheelton v. Hardisty, 8 El. & B. 232, the replication was on the equitable ground that, before the policy was entered into, defendants circulated a prospectus whereby they undertook that their policies should be unquestionable except on the ground of fraud, and that plaintiffs were induced to enter into the policy on the faith thereof. Issue was taken thereon. On trial it appeared that such a prospectus was issued, but no express proof was given that plaintiffs saw it, or were induced by it to make the policy. The jury found for the plaintiff, and it was held that there was not sufficient evidence to warrant the finding. Lord Campbell dissented, and on this part of the judgment below the Exchequer Chamber pronounced no opinion. The judgment of the Queen's Bench was announced in the following language: "The verdict passed for plaintiffs, subject to the question whether there was any evidence of plaintiff's knowing of, or having been induced to enter into the policy by the prospectus. On the first point the question is whether the proof was such as that a jury could reasonably come to the conclusion that the plaintiff knew of and acted on the prospectus. The Exchequer Chamber has now put an end to what had been treated, as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence. No such proof, it seems to us, could justify the jury in finding the issue for plaintiff. Plaintiff may very well have effected the written contract without any reference to the prospectus. Evidence of the existence of the prospectus was quite as consistent with the plaintiff not knowing of or acting upon it." Now, independently of the dissent of Lord Campbell and the silence of the Exchequer Chamber, the case at bar differs from the case just cited in these circumstances: 1. That the old English rule seems still to obtain in this state, and, if there is any evidence, the jury is to pass upon it, however weak it may be; and, 2, inasmuch as plaintiff's agent has paid the premium in the policy sued on in the case at bar, punctually for twelve years consecutively, and, in the event of his ceasing to pay, would, in the absence of knowledge of the prospectus, lose all benefit of the money he had already advanced for his wife, the evidence in the case at bar was by no means as consistent with his not knowing of the prospectus as it is with his knowing and acting upon it. In this case the prospectus was issued, and so circulated and thrust under the nose of every one having dealings with defendant, that it seems difficult to believe that plaintiff's agent did not see it and read the notice it contained. In the case of Wheelton v. Hardisty, the officers of plaintiff were on the witness stand, yet they were never asked whether they had seen the prospectus, or were induced by it to insure in the defendant. In the case at bar, Steel, who paid the premiums, was dead, and we can never hear from his mouth whether he read the prospectus, or was influenced by it to cease paying his premiums. In Wheelton v. Hardisty it does not seem to have been proved, except by inference, that the prospectus in question was given to the customers of defendant, or posted up in defendant's place of business, but in the case before us there was direct proof of both these facts. We quote from the dissenting opinion of Lord Campbell: "Was the judge at the trial wrong in leaving the issue of the equitable replication to the jury, and telling them that,

from the circulation of the prospectus in the manner admitted, and the execution of the policy, they might, if they were so convinced, without express evidence to that effect, find that defendant had seen the prospectus and was induced by it to effect the policy with defendant? From two facts being established by express evidence, an intervening fact may be presumed. If a strong probability is raised by express evidence, unless the probable consequence may be inferred, the business of life could not be conducted, and justice could not be administered. In the present case the jury were by no means bound to infer that the plaintiff saw the prospectus, and was influenced by it. But I think that the jury might not unnaturally infer that, according to the course of business, copies of the prospectus were given to customers coming to defendant's place of business, and were posted up in their office so as to be seen by all who dealt with them; the object of defendant evidently being that the prospectus should be known as generally as possible. Suppose it had been proved that over the outer door of the house in which the business of defendant had been conducted, there had been the words in large letters: "*All policies effected with this association shall be unquestionable unless obtained by fraud*," and that there was a similar notice on the walls of the room in which the policy in question was executed and delivered to plaintiff, would it have been necessary for plaintiff to give evidence that they had actually seen and read the notice,—might not the jury equally infer that the prospectus, generally circulated, according to the admission, was seen and read by plaintiff?" And Coleridge, J., says, in Watson v. Earl Charlemont (2 Ad. & Ell. 863): "I am of opinion that if an advertisement is put out to induce parties to enter into a certain contract, and an individual afterwards does enter into such contract, and then comes into court to complain of misrepresentation, it is no part of his case to show that he was cognizant of the advertisement; *prima facie*, it will be taken that he was influenced by it." In this opinion, Wightman, J., concurred. In Wonther v. Shairp (4 C. B. R. 408), some evidence was given from which it might be inferred that the plaintiff saw the advertisement, and it was held that the jury might well find that it was a material inducement for him to pay his money. There was no direct evidence that plaintiff saw the advertisement; but it was published in the Times, and plaintiff took the Times. There was, then, we think, evidence from which the jury might find that Steel saw the notice of defendant, and acted upon it.

4. It remains to consider the legal effect of this evidence. It is held by appellant that the evidence, as tending to vary a written contract, is incompetent. It is said by Chief Justice Parker, that policies of insurance, though not under seal, have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in case of specialties. Higginson v. Dall, 13 Mass. 26. "If this circular is admitted," it is urged by appellant, "it is by the invocation of oral testimony. Of itself it proves nothing, as it bears no evidence of being the act of the parties. It is produced as containing the usage by which, it is alleged, the company is bound. It is set up by parol, and, if admitted, it is brought to bear upon the policy by the aid of parol evidence. If admitted, it contradicts the express stipulations of the policy." This is the language of Nisbet, J., delivering the opinion of the court in Insurance Co. v. Ruse (8 Ga. 534). In that case printed prospectuses, purporting to be the terms and conditions of insurance, were put out by the company to persons dealing with them, one article of which was that a party, neglecting to settle his annual premium within thirty days after it is due, forfeits the interest he has in the policy. There was no reference to the printed proposals in the policy. The premium was due April 10, 1847, and the insured died four days after that date, leaving the premium unpaid. It was held that the article in relation to thirty days did not extend the contract of insurance beyond the time designated in the policy. So, in England, it has been held that where an insurance company advertises that they do now, and have always considered insurance in their office as continuing fifteen days after the time limited for payment in the policy, such an indulgence is merely to avoid the expense of new insurance and a new policy, and serves merely to keep the policy in suspense, but that, if the premium is not paid before loss, the defendant is not liable. See Tarleton v. Stamforth, 5 T. R, 695; Salvin v. James, 6 East, 571. In Ruse v. Mut. Benefit Life Ins. Co. (26 Barb. 556), the insured died three days after the premium was due, leaving it unpaid. A prospectus of the company, setting forth that a party neglecting to settle his premium within thirty days after it was due forfeited all interest in the policy, was introduced in evidence, and proved to have been shown to the insured when the policy was taken out. The supreme court held that the prospectus was a waiver of the forfeiture. On appeal, the court of appeals (23 N. Y. 578) reversed the cause, and held the prospectus inadmissible to vary or control the express provisions of the policy; but on motion for rehearing (24 N. Y. 653, 1853), the court says that the attention of the court was not called to several decisions in England, where a contrary rule had been adopted in reference to the prospectus controlling the terms of the policy; that these cases certainly hold that the prospectus might equitably be regarded as controlling, and that an examination of these cases would probably have led the court to different conclusions on this point. But, as the case turned on a different point in the court of appeals, the rehearing was denied. The English cases referred to are Wood v. Dwarris, 11 Exch. 493; Collett v. Morrison, 9 Ware, 173, and Wheelton v. Hardisty, referred to above. In Massachusetts the general course of decisions on policies of insurance is much stricter than in other states, certainly stricter than in New York and most of the western states. Matters preceding or contemporaneous with the issuing of the policy and vesting in parol are not admitted to establish a waiver of its conditions; but in New York, Michigan, Wisconsin, Iowa and other states, parol evidence of the conduct of the agent of the insurer, before or at the date of the policy, is held admissible to establish a waiver of its condition. Viele v. Germania Ins. Co., 25 Ia. 1, and note. It is well settled that parties may, by a subsequent parol agreement, on sufficient consideration, abrogate or vary a written contract. Herring v. United States Ins. Co., 47 Mo. 438. But the decisions in our own state go further than this, and it is held that the waiver of a condition or a forfeiture of a policy of insurance need not be founded on a new consideration, and that the company may be estopped where, by a course of dealing, or its open actions, it has induced the insured to pursue a policy to his detriment. Horwitz v. Equitable Ins. Co., 40 Mo. 360. In Thompson v. St. Louis Life Ins. Co. (52 Mo. 478) the policy sued on has a memorandum at its foot that "agents are not authorized to waive forfeiture. If premiums are received by the company after the day named, it is an act of courtesy and grace, and forms no precedent." It was shown that the defendant had received premiums of the insured weeks after they were due; the premium due on the 28th of March, 1870, was not tendered until two days afterwards, when it was refused; the insured shortly after died. It was held that defendants were liable. So where there was an express condition in a policy of life insurance, that if any other

insurance was taken without the written consent of the company indorsed on the policy, the policy should be void. Other insurance was taken, and notice given to the agent of the company, who expressed dissent, but no indorsement was made. The company was held to be estopped to set up this want of indorsement as a defense. Pilkington v. National Ins. Co., 55 Mo. 172; Geib v. Ins. Co., 1 Dill. 449.

The second instruction for plaintiff requires the jury to deduct from the amount of the policy the premium due February 8, 1873, and also the premium note maturing on that day. This instruction can not be defended; but the error is not to the prejudice of appellant, nor has our attention been called to it in the argument. It is clear that the premium due February 8, and the premium note maturing on that day, were both paid by the premium reserve. Had this not been so, the policy would have been forfeited for non-payment of premium, for the premium was not otherwise paid. The petition alleges that the balance of reserve on the 8th of February, 1873, was sufficient to keep up the insurance until the 17th of October, 1877, for the full amount. It was admitted on the trial that the balance was sufficient to keep up the insurance for the amount named in the policy for a period beyond Steel's death, and, before closing her case, plaintiff offered to show to what date the reserve would keep the policy alive, but on objection of defendant she was not permitted to do so. This testimony was objected to by defendant, on the ground that it was wholly immaterial, in view of the admission by defendant, that the reserve was sufficient to keep up insurance for the full amount, up to and beyond the date of the death of the insured. If it was material to prove that the reserve balance was in fact sufficient to keep up the insurance until the 17th of October, 1877,—the date alleged by plaintiff in her petition,—in view of the exclusion of testimony to this effect at the instance of defendant, on the ground of its immateriality, this might be taken as admitted. It is, however, sufficient that the reserve carried the insurance for the full amount of the policy up to the death of Stewart Steel. It therefore paid the premium-note. The verdict should have been for $3,000 and interest from February 18, 1874 (three months after Steel's death). It is for a sum considerably less than this amount, but this is not an error of which defendant can complain.

We are of opinion that there was evidence to go to the jury upon the question whether Steele knew of and relied upon the assurance made in the prospectus, and this evidence was competent; and, the jury having found that Steele did know of and rely upon the proposal of the company to extend the full amount of insurance over such period of time as the premium reserve would pay for, the company is estopped by its acts and declarations from asserting, as a defense against this policy, that the premium of February 8 was not paid.

We see no error in the record to warrant a reversal of the judgment, and it is affirmed. The other judges concur.

NOTE.—In Wood v. Dwarris, 11 Exch. 493, the prospectus of the insurers announced that their policies should be "indisputable" except in cases of fraud; and in Wheelton v. Hardisty, 8 El. & B. 232, a like prospectus announced that the policies should be "unquestionable," except in cases of fraud; and it was held in each case that the prospectus was admissible in evidence, and formed a good equitable answer by the plaintiff to the defendant's claim that the policy was void by reason of misrepresentations; and so the plaintiffs recovered at law on the policies, but upon equitable principles. In these cases the prospectus had been issued and circulated by the insurer prior to the making of the policy. For other English cases in which a prospectus or advertisement has been held admissible in evidence, in cases where the contract was afterwards made writing, see Watson v. Earl Charlemont, and Wonther v. Shairp, referred to *supra*, and Central Railway Co. v. Kisch, Law Rep. 2 H. L. 99. But when Wood v. Dwarris was subsequently presented to the Exchequer Chamber as an authority for admitting in evidence a parol agreement, contemporaneous with the policy, and at variance with some of its terms, the court refused to go to that extent. Reis v. Scottish Equitable Life Ass. Soc., 2 Hurl. & N. 19.

The American courts have generally taken the contrary view, that a prospectus or advertisement issued by the insurer is inadmissible in evidence in an action on the policy. The case between Ruse and the Mutual Benefit Life Ins. Co., is the principal case. There the insurer had issued a pamphlet which led applicants to believe that thirty days grace would be allowed on payments of premium. It was held in 8 Geo. 534, that this pamphlet was inadmissible in evidence to vary the terms of the policy, and the judgment that had been rendered with this pamphlet in evidence was reversed and a new trial was ordered. The case next appeared in New York, where, in 26 Barb. 556, the pamphlet or prospectus was held sufficient to estop the insurer. This judgment was reversed in 23 N. Y. 516, the prospectus being held inadmissible in evidence. The case was again before the court of appeals, in 24 N. Y. 653, on an application for rehearing, the English cases above cited being relied on as authority for a contrary decision; but the rehearing was refused, though not upon any farther adjudication of the point, the court admitting that it might have been inclined to listen to a re-argument, after examining the English cases. But in the later case of Koelgers v. Guardian Mutual Life Ins. Co., 57 N. Y. 638, the commission of appeals reversed a judgment, because counsel for plaintiff had been permitted to read from a pamphlet proved to have been issued by the defendant, which contained the words "non-forfeited olicies" upwards of forty times. In Higginson v. Doll, 13 Mass. 96, a written memorandum, delivered by the agent to the insurance broker, was held of no effect to control or vary the terms of the policy.

The principal case marks the initiative of an entire dissent from these other American cases. The court evidently treats the wholesale issuance of its "non-forfeiting" circulars by the insurer, as equivalent to Lord Campbell's suppositious posting (in Wheelton v. Hardisty) of the words, "all policies unquestionable," upon the outer and inner walls of the insurer's office.

It will be seen that the character and extent of the "non-forfeiting" provisions introduced by this circular into the policies of the defendant company, were similar to those applied by the Massachusetts non-forfeiture act of 1861, ch. 186, to all policies of life insurance issued by companies chartered by the commonwealth (see Pitt v. Berkshire Life Ins. Co., 100 Mass. 500), and which later statutes have made a part of every policy issued by any foreign insurance company to any citizen or resident of Massachusetts, as held by the supreme judicial court of that state, in Morris v. Penn. Mutual Life Ins. Co., 6 Ins. Law Jour. 17.

P.

"CIVIL DAMAGE" LAWS — EXEMPLARY DAMAGES.

FRIEND v. DUNKS.

Supreme Court of Michigan, June Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, } Associate Justices.
" ISAAC MARSTON, }
" B. F. GRAVES, }

1. PLEADING—MISJOINDER OF FORMS OF ACTION.—The Michigan statute allowing the recovery of damages for injuries arising from the sale of liquor, also allows money paid for liquor to be recovered as paid without consideration. *Held*, (*a*) that assumpsit is the proper form of action for the recovery of the money paid; (*b*) that case is the proper form for the recovery of the damages; (*c*) that it is a misjoinder of causes of action to sue for the recovery of both under a single count in an action of trespass on the case.

2. EXEMPLARY DAMAGES FOR MENTAL DISTRESS.—Under a statute giving exemplary damages to the wife "who shall be injured in person, property, means of support, *or otherwise* * * by reason of the intoxication of any person,"

it is *held* proper to show that she had been excluded from society on account of her husband's intoxication, and to give evidence of her mental sufferings, generally, on account of his drunkenness. But facts should not be admitted tending to prove damages that are merely fanciful or too remote.

3. EVIDENCE IN CIVIL DAMAGE SUITS.—In an action for injuries to a wife arising from the sale of liquor to her husband, there should, as a rule, be no evidence allowed of facts antecedent to the unlawful acts complained of, except to show his habits and circumstances before they were committed; but the jury should be told to discriminate between losses caused by commercial changes and those which result from drunken neglect. The evidence of his pecuniary condition before the acts complained of is not to be introduced as showing a substantive cause of action, but to be considered with other facts as showing the damage sustained by plaintiff.

4. ——. EVIDENCE OF FORMER INTEMPERATE HABITS.—The mere fact that a man had been of intemperate habits before he began to buy liquor of a particular dealer, will not prevent his wife from recovering in an action against that dealer for injuries done her by sales which he had made to her husband.

MARSTON, J., delivered the opinion of the court:

The plaintiff in error was brought into court upon a *capias* to answer to the suit of Helen M. Dunks "in an action of trespass on the case for selling and giving liquor to Edward J. Dunks, her husband, in violation of law, and contributing to the intoxication of said Edward J. Dunks to the damage of said plaintiff," etc.

The declaration consists of but one count, and under it plaintiff sought to recover back the moneys paid by her husband to defendant for liquor, and also damages for the injury which she sustained by reason of the intoxication of her said husband. Counsel for plaintiff in error insist that there was a misjoinder of two distinct causes of action in this count,—an action of assumpsit to recover back the moneys paid for liquors sold, and an action of tort to recover damages for the injuries sustained by reason of the intoxication of her husband.

That such causes of action can not be joined in this manner, counsel for defendant in error do not deny, nor do they dispute the effect of such a misjoinder. They deny any misjoinder. They say there is in the declaration no count in assumpsit; that the statute gives the wife the right to recover back the money, and to recover the other damages enumerated; that the whole cause depends upon the wrongful and unlawful acts of the defendant; and that *case* is the appopriate remedy.

That this is the appropriate remedy to recover any damages which the plaintiff has sustained by reason of such intoxication of her husband, there can be no question, and this is conceded by counsel for both parties. It seems, therefore, only necessary to determine whether it is also the appropriate form to recover back moneys paid for spirituous or intoxicating liquors under the statute.

The statute under which this action was brought prohibited the manufacture and sale of certain kinds of liquors, except as therein specified. The second section provided that all payments for such liquors sold in violation of law should be considered as having been received without consideration and against law and equity, and that any money or other property paid therefor might be recovered back by the person so paying the same, his wife or any of his children, or his parent, guardian, husband or employer. Farther on in this same section, any wife, child, parent, guardian, husband, or other person who shall be injured in person, property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action against any one who, by selling or giving intoxicating liquor caused or contributed to the intoxication of such person, and in any such action the plaintiff shall have a right to recover actual and exemplary damages. These are the provisions under which this action was brought. The statute does not prescribe the form of remedy so that the party seeking to recover under either of these provisions must resort to the common law for an appropriate form of action.

That assumpsit it the proper form of action to recover back moneys which have been received by a person without consideration and against law and equity there could seem to be no reasonable doubt. And the late cases in this state sustaining the right of the party making such payments to set off the same in an action brought against him, is a clear recognition of this principle. Roethke v. Philip Best Brewing Co., 33 Mich. 340; Webber v. Howe *et al.*, April Term, 16 Am. L. Reg. (N. S.) 425.

We consider it equally clear that *case* is not the appropriate remedy. There are also other considerations arising out of these statutory provisions, which would prevent claims arising thereunder from being recovered under the same form of action and count as was attempted in this case. It is quite clear that if either of the persons mentioned under the first clause brings an action and recovers back the moneys paid for such liquors, neither of the other persons named could thereafter bring an action to recover back the same moneys. The first action would be a bar to any future action that might be brought. The money paid could be recovered back but once, and a recovery by one would prevent a recovery by the others. This would not be so in reference to injuries sustained. Several persons may at the same time be injured in person, property, or means of support, by an intoxicated person, or by reason of his intoxication, and the injury to each, where several, would entitle each to maintain a cause of action therefor; and where several such actions were brought the defense might vary somewhat in each case, yet would be substantially the same. The defenses, however, in an action brought to recover back money paid as being paid, without consideration, and in an action to recover damages sustained, would be very different, and the evidence introduced in each case would, in many respects, be different also.

In the former action, which is an equitable one, the party endeavors to prove the amount paid,—the issue is limited and simple. In the latter the party is entitled to recover the actual damages sustained, and also exemplary damages; under such an issue it is very evident that the evidence introduced must take a much wider range than it possibly could in the other case, and any joinder of the two causes of action could but lead to confusion and injurious results. The objections made in the court below upon this branch of the case should have been sustained.

As the case must go back for a new trial, and as this difficulty may be obviated by an amendment of the declaration, by striking out all claim for moneys paid, thus making it conform with the writ, we will proceed to consider such of the other questions raised as are again likely to arise upon a new trial.

During the trial counsel for the plaintiff introduced evidence tending to prove the amount and value of plaintiff's husband's property and business, when first he became a resident of Hudson, in 1865, and when he left Hudson, in 1875. They also introduced evidence tending to show how plaintiff's health was injuriously affected on account of her husband's intoxication; that she was excluded from society on account thereof; and her mental sufferings generally on account of his drunkenness. This was all objected to, and is assigned as error.

Our statute gives to the wife who has been injured

in person, property, means of support, *or otherwise*, by any intoxicated person, or by reason of the intoxication of any person, a right of action in her own name against the person who has, by selling or giving any intoxicating liquor or otherwise, caused or contributed to such intoxication, "and in any such action the plaintiff shall have a right to recover actual and exemplary damages."

In Mulford v. Clewell, 21 Ohio St. 196, it was held that a count in the declaration, which merely charged that the plaintiff had suffered mental anguish, disgrace, and loss of society or companionship, was not sufficient; that such suffering did not amount to "injury to the person," within the meaning of the statute. Without any desire at present either to approve of this ruling or to question its correctness, our statute, in the light of previous decisions in this court, may admit of a different construction.

The wrong committed by the defendant in selling intoxicating liquors to the plaintiff's husband was not only in open violation of the laws of this state, but was persistently persevered in by the defendant, regardless alike of the suffering and ruin he was inflicting and entailing upon the unfortunate victim and upon his innocent and unoffending wife and child. A jury might measure, if they could, and allow the wife every dollar she could prove she had sustained for the injuries to her person, her property, and means of support, and then would fall far short of compensating her for the shame and mental anxiety which she suffered daily in seeing her husband becoming a common drunkard, the finger of scorn pointed at him, his business neglected and going to ruin, his property melting away, himself and wife excluded from respectable society, the means which should be used in the support of his family squandered in strong drink, and his once happy home broken up and destroyed, if these facts could not be proven and considered by them. These are but some of the natural results of drunkenness, and the better sense of all good people recognize the mental suffering thus caused as constituting a real injury to the person; and although not capable of an actual money measurement, yet that it should be taken into consideration by a jury who could, from all the facts in the case, and their own sense of justice, award such damages as would at least compensate in part for the great wrong done her, and at the same time punish the defendant for the gross, wilful and deliberate wrong which he, for mere gain, had wantonly perpetrated.

Mental injuries are frequently of the most deep and lasting kind, and the wounds thus inflicted are often the most severe. That they are a real injury and damage to the sufferer, no one will dispute. Why, then, should a jury not consider them? Take the case of a husband and wife who are dependent upon his daily labor for support. If he has good health, is sober and industrious, the reward received for his toil will enable them to live comfortably and respectably, and if they are blessed with children, to educate and bring them up to become good, respectable and useful citizens. In an evil hour he is led astray and commences the use of intoxicating liquors. Unable to control himself in their use he becomes a drunkard; he suffers mental or physical impairment; he no longer works with any degree of regularity, and squanders in drink the pittance he is able to earn; he deserts his home, his wife is neglected, and his children become outcasts. An action is brought to recover damages in such a case. Would the amount of money, which the wife had lost as a means of support from not receiving her husband's daily wages, or the benefit thereof, compensate her for the damages she suffered? And yet it would be a very serious question whether she could show, with any degree of certainty, any other direct loss she had sustained. To confine the damages in such a case to the direct money loss she had sustained, or to the loss in her means of support, and refuse to recognize as a proper element of damages the far greater and irreparable injury she had sustained in person on account of mental anguish, disgrace, loss of society and companionship from such causes, would be but a mere mockery of justice. These damages are not, nor are the consequences and results we have referred to, merely fanciful. It would, perhaps, be much better for society if they were; but the sad truth is that these are but the natural and probable consequences of the drunkard's career. They are of every-day occurrence, and the liquor-dealer who will sell or give liquors to a person in the habit of becoming intoxicated, must know that all these evils, and frequently many others, will follow as a natural consequence. They are but the natural and probable consequences of his own wrongful act, and as such may be submitted to and considered by the jury.

Care should, however, be taken in this class of cases not to permit facts to be given in evidence tending to prove damages which might be considered fanciful merely, or too remote. Of course, in a case like the present, the inquiry extends over a considerable space of time, and yet even here there should be some limit. The declaration sets forth that the plaintiff's husband had been, to all outward appearances, a sober man from the time of their marriage until April 20, 1871, when the unlawful acts complained of commenced.

Now, while the inquiry may fairly extend to all the facts and circumstances between that period and the time of the commencement of the action,—at least, except for the purpose of showing the person's physical and pecunjary condition, his habits of industry and sobriety, his social position, and the care and treatment bestowed upon his wife and family, immediately previous to that date, it should not be extended beyond that time. Such, at least, should be the general rule. And while an inquiry may be made as to his pecuniary cirmumstances within the rule here laid down, but not as a substantive cause of action, we think that it should not be extended, as was done in this case, to the year 1865, when he first came to Hudson;—this was too remote. In permitting this class of testimony, no matter how limited in point of time, the jury should be instructed to discriminate between losses occasioned by the changes and fluctuations in business, and those resulting from a neglect of business, occasioned by drinking.

In many cases it must be difficult to make this discrimination. A person engaged in business may be, to all outward appearances, prosperous, and supposed to be carrying on a profitable business, while in fact he may be on the verge of bankruptcy, and this fact, unknown to others, may be the cause of his indulging in intoxicating liquors. The neglect of business, and the loss of property in consequence thereof, whenever the same can fairly be attributed to his intemperate habits, may properly be laid before the jury; and so of many other facts, as the effect upon the children; not, as we have already said, as a substantive cause of action,—not for the purpose of allowing the amount of the loss of property, or the injuries to the child sustained, as damages, because the property so lost was not the property of the plaintiff, and the child is given a right of action of its own,—but as circumstances to be considered in the case with all the others, as tending to show the damages sustained by the plaintiff. Upon this subject, see Gansly v. Perkins, 30 Mich. 494.

As was said in Mulford v. Clewell, already referred to: "In order to sustain her action, under these statutes, for injury to her means of support, it is by no means necessary that she should show that she has actually

been without support, or been at any time in whole or in part deprived of means of support. *Means* of support relate to the *future* as well as the present. It is enough if she show that the sources of her future support have been cut off or diminshed below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. Of course the damages in such case would not be commensurate with the amount of loss or injury to the husband's estate, but merely the diminution, if any, thereby resulting to the wife's means of present and future support. What these damages are in any given case, the legislature have seen proper to leave in these broad terms to a jury to determine."

This whole question of permitting all the facts and circumstances in this class of cases to be laid before the jury, under such instructions and advice from the court as would tend to prevent the allowance of such as might be merely possible or too remote and fanciful in their character to be safely considered as the result of the injury, was clearly laid down by Christiancy, J., in Allison v. Chandler, 11 Mich. 555, 556. and the question of allowing for mental as well as physical damages was fully considered in Welch v. Ware, 32 Mich. 83, 12 Cent. L. J. 346. And we see no occasion to depart from what was there said upon this subject.

The fourth request of defendant to charge, was too broad, and the court properly modified it. The mere fact that Dunks was of intemperate habits previous to April, 1871, would not justify the defendant in selling liquor to him, and would not prevent the plaintiff from recovering damages on account of injuries sustained, caused by his intoxication from the use of liquors sold him by defendant after that date. Ganssly v. Perkins, 30 Mich. 495. For his intemperance previous to that time defendant would not be responsible.

For the errors already referred to, the judgment must be reversed, with costs, and a new trial ordered.

NOTE.—The courts generally incline to a broad construction of that clause in the civil damage laws that authorizes exemplary damages. In Indiana, indeed, the law is so strictly construed as to be stripped of much of the force elsewhere attributed to it, and it is supposed that exemplary damages are not favored there, though what the supreme court of that state do hold as a final opinion upon that subject, it would be assuming too much to undertake to state yet, seeing that at the Februrary term of this year they held that the clause allowing such damages did not conflict with the constitution (Schafer v. Smith, 4 Cent. L. J., 317), and at the May term declared that it did. Koerner v. Oberly, 5 Cent. L. J. 30. A similar disposition was shown in New York in the case of Hayes v. Phelan, 4 Hun, 733, but latter decisions have deprived that of authority.

But the principles generally established are as follows: Exemplary damages can not be allowed unless there is actual injury (Freese v. Tripp, 70 Ill. 496; s. c., 6 Chic. L. N. 360; Hackett v. Smelsley, 77 Ill. 109; Ganssly v. Perkins 30 Mich. 492); but if there is, they can be. Schneider v. Hosier, 21 Ohio St. 98. They should not be given, however, unless there are circumstances of abuse or aggravation on the part of the dealer (Franklin v. Schermerhorn, 8 Hun, 12), or "unless his conduct is willful, wanton, reckless, or otherwise deserving of punishment beyond what the requirements of mere compensation would impose." Kreiter v. Nichols, 28 Mich. 496. The actual damages should be as nearly commensurate with the actual injury as the nature of the case will permit, and exemplary damages should be given only "where the plaintiff has some personal right to complain of a wanton and wilful wrong, which the wrongdoer, when he committed it, must be regarded as having committed against the plaintiff herself, in spite of the injury he must have known she was likely to suffer by it." Ganssly v. Perkins, 30 Mich. 492. In the case of Kreiter v. Nichols, exemplary damages were not permitted, because it did not appear that the defendant had purposely contributed to the intoxication complained of. Nor are they permitted where the liquor is obtained by strategy and in spite of the vendor's refusal. Bates v. Davis, 76 Ill. 222. In these cases, however, the actual damages were recoverable, and are allowed even when the sale was made at the wife's request, if the vendor knew that the request was made under *duress* and to keep peace in the family. Jewett v. Wanshura, 10 West. Jur. 527; 3 Cent. L. J. 649, notes. Exemplary damages are allowed, of course, where a wife has previously notified defendant not to sell her husband drink (McEvoy v. Humphrey, 77 Ill. 388), but they are by no means confined to such cases, nor to cases where the liquor was supplied with knowledge that the buyer had been trying to reform, and with the purpose of preventing him by placing temptation in his way. Hackett v. Smelsley, 77 Ill. 109.

A distinction is made, or attempted, between actual injuries and those which are fanciful. The following are recognized as of the former class: The stoppage of a husband's earnings is an actionable injury (Schneider v. Hosier, 21 Ohio St. 98), and so the death of a husband is held a permanent injury to the wife's means of support, and is declared to amount to total deprivation, and to warrant a remunerative and substantial verdict. Emory v. Addis, 71 Ill. This is so, whether, as in Schneider v. Hosier, death is the consequence of drunken habits, or results from injuries received in a fight while drunk (Jackson v. Brookyrs, 5 Hun, 530); or from wandering away and freezing while suffering from injuries received in a fight with other drunken persons (Bedore v. Newton, 54 N. H. 117; 2 Cent. L. J. 363); or from being dragged by one's buggy while on the way home drunk (Mead v. Stratton, 8 Hun, 148); or from being run over while lying overcome with liquor on a railroad track. Smith v. Reynolds, 8 Hun, 123. But see *contra*, Collier v. Earley (Ind.), 4 Cent. L. J. 406, notes, in which it is held there is no liability in such a case, as the injury itself is not a natural or necessary result of the act of selling. The same rule was applied where death resulted from bruises received from a heavy barrel that had tipped over upon the drunken man as he lay in a wagon, in which he was being driven home by a drunken neighbor. Krach v. Heilman, 53 Ind. 311; s. c., 4 Cent. L. J. 233. And in Vermont the fruther limitation is made that the injury must be some unlawful damage or hurt, and will not include the killing of a drunken man by another person acting in self-defense and resisting an attack. Smith v. Wilcox, 47 Vt. 537. It is not clear why this should be distinguished from the preceding cases of death from injuries received in an affray; it is not the drunken man's assailant who is prosecuted, but the dealer who furnished the liquor, without which the affray would not have occurred. But see Shugart v. Egan (Ill.), 1 Month. Jur. 145; 5 Cent. L. J. 66, notes, following a strict application of the doctrine of proximate cause to settle whether injuries received, even in a drunken quarrel, result from the sale of the liquor. An action lies at the instance of the wife of an outside party killed by one who had been drinking, and is brought against the man who sold the liquor. Stanton v. Shipman, 48 Vt. 628.

It is an actionable injury to destroy a man's health and ability to labor—his power to accumulate future means of support (Mulford v. Clewell, 21 Ohio St. 191), since where he has been able to work and his wife depends on him, his disability is an injury to her means of support, and the more so if he becomes a burden on her by putting her to expense for care and medical attendance on his account. Wightman v. Devere, 33 Wis. 570. This principle was properly applied also in behalf of a father who not only lost his son's services, but was put to great expense by reason of his son's becoming insane from falling on the back of his head while drunk, and making it necessary to have him cared for in an asylum (Volans v. Owen, 9 Hun, 558), and in behalf of a wife, whose husband, a cripple, was knocked down and robbed while drunk. Franklin v. Schermerhorn, 8 Hun, 112. It was considered an injury to a woman's means of support that her husband spent for drink money that she had trusted him with to buy a horse for her to use in business. (McEvoy v. Humphrey, 77 Ill. 388); and that a son, while drunk, overdrove and so killed a horse belonging to his mother. Bertholf v. O'Reilly, 8 Hun, 16. Indeed, the simple spending of one's money on liquor is adjudged a sufficient injury to the wife's means of support to sustain an action by her. Quain v. Russell, 8 Hun, 319. And before the decisions in Krach v. Heilman, and in Collier v. Earley, it was held in Indiana, where the law is that "the wife, etc., or other persons injured shall have a right to recover," one who was for a time incapacitated for labor by being beaten by a drunken man, was allowed to recover against the dealer. English v. Beard, 51 Ind. 489.

It has been held a physical injury, that would sustain an action by a wife against a liquor-dealer, for her drunken

husband to threaten and abuse her, and frighten her out of doors, and the jury was left to allow such damages as they might consider a just compensation for the injury to her feelings, her fright, and the indignity. Peterson v. Knoble, 35 Wis. 80. And where exemplary damages are permitted, their amount is left to the judgment and sound discretion of the jury, (Wightman v. Devere, 33 Wis. 570), who ought to consider all the circumstances properly before them tending to aggravate or mitigate the conduct of the wrongdoer. Schneider v. Hosier, 21 Ohio St. 113.

It appears from these cases that, where the sale of intoxicating liquor can reasonably be held to have resulted in pecuniary or personal injury to any one, aside from the buyer, that person can recover damages against the liquor-seller. This is true, also, where the sale is made by a servant of the dealer and against the latter's orders (Kreiter v. Nichols, 28 Mich. 496), the master being liable for the acts of his servant. But if the sale is in fact so made, it is apparent, of course, from what has been already stated, that exemplary damages can not be awarded against the defendant. Two elements of a rule governing damages of that description seem to be settled: the sale of liquor must have (1) resulted in an actual injury to the plaintiff, and (2) been made with the consent of the defendant It remains to be determined how far such sales are to be regarded as "wilful, wanton, reckless or otherwise deserving of punishment." The foregoing decision goes far to establish the propositions that all sales are made at the peril of the dealer, and that the nature of the traffic raises the presumption that every sale which he purposely makes is sufficiently wanton to support a claim for exemplary damages, if actual injury results from it. It may be regarded as a well established general rule that the sale is a proximate cause of the injury wherever the injury would not have been likely to have taken place if the sale had not been made. But it is still an open question whether mental distress is not of itself such an injury as to support a claim for exemplary damages. The observations of the learned judge in the case reported forcibly sustain the belief that it is, and there have been expressions in other tribunals that indicate a leaning toward that conclusion. As to the construction, in general, of statutes giving actions for damages for injuries arising from the sale or gift of intoxication liquors, see the pamphlet of Mr. Lawson, advertised elsewhere. H. A. C.

CORRESPONDENCE.

"ANCIENT LIGHTS" IN ILLINOIS.

WINCHESTER, ILL., Aug., 1877.

To the Editor of the Central Law Journal:

In speaking of "Ancient Lights" in "Current Topics," 5 Cent. L. J. 25, you say: "In fact, New Jersey, Louisiana, and Illinois would seem to be the only states that continue to adhere to the English rule." You are mistaken as to Illinois. In Guest v. Reynolds, 68 Ill. 478, the supreme court of this state have expressly declared that the English doctrine of prescriptive right to lights, views and prospects, is not adapted to the condition of affairs in this country, and not in force in Illinois.

Very truly, JAS. M. RIGGS.

IS A DEAD, LATE PRIVATE CITIZEN THE PLAINTIFF IN AN INDICTMENT CARRIED ON IN THE NAME OF THE STATE?

To the Editor of the Central Law Journal:

It is said that the time will come when the heavens above our earth "shall be rolled together as a scroll" and packed away, and this earthly clock-work shall run down, or accumulate too much dirt to run, or be burned up; at which time it is to be inferred, earthly wonders will cease. But when?

At the period of the birth of the present older inhabitants, the prevalent doctrine was, that, when a man dies, he enters upon a higher or lower sphere of existence; or, at any rate, he is done with earth. By and by it was ascertained that this is not quite so; he comes back to "rap." It was next discovered that he "tips the table;" but whether or not to eat the food tumbled off, is still a matter of nice speculation. Other things have been learned, contrary to the old doctrine. General Washington has been seen among us, on "the identical horse," equipped for the fight. Has he really fought? That query the future inquirer will solve.

And now we have the further discovery that, when a man has been feloniously killed, he still lingers on the earth and becomes a "party" to judicial proceedings, conducted in the name of the state, against the murderer. The original announcement of this discoverg was in May last, in this journal. A writer, speaking of the evidence of uncommunicated threats in cases of homicide, says: "Such evidence is in the nature of a declaration of a party to the action, and is supported by the same grounds. The state prosecutes in the stead of the deceased person. * * * * The badges of hearsay are wholly wanting; for the witness who hears the threats is upon the stand. Let us repeat, the jury are to determine *which party is in fault.*" 4 Cent. L. J. 465. This discovery, let us observe, did not proceed from any court. The announcement occurs in a note to "State v. Elliot," an Iowa case, written in support of one of the points decided; but it is flat against what the judge said in the case. Speaking of some dying declarations, he said: "If Bold [the deceased] had been alive, he would have been a competent, [not party, but] *witness.* And this accords with what has been heretofore unquestioned doctrine; namely, that, in the language of Greenleaf, "where the declarant, if living, would have been incompetent to testify, by reason of infamy, or the like, his dying declarations are inadmissible;" putting the deceased on the exact ground of a witness, but not in any degree, of a party. 1 Greenl. Ev., § 157. Every decision, therefore, that a dying declaration may be received, distinctly affirms the doctrine that the deceased is not a party; for, under the rules of the common law, a party can not testify. Or, is the discovery that, though the injured person, in a criminal cause, is not a party if he lives, his ghost is if he dies? Exact form and further testimony to this discovery have just been given by another writer. His words are: "The deceased is not 'a mere third person,' but a party." 5 Cent. L. J. 99.

If this doctrine should find place upon the bench, which it has not yet, so far as we are aware, in any single case, it might prove convenient. Often the courts would cease to be troubled with questions about dying declarations. Under the late statutes permitting parties to testify, the ghost would take the stand; for, if he can carry on an indictment, he certainly can take an oath and can speak,—and all would be made plain.

There are grounds on which the admissibility of uncommunicated threats may be discussed, consistently with the known rules of law. This is not such ground; for the ghostly doctrines have not yet been received into our jurisprudence; nor has any exception been admitted to the proposition, that the person injured, whether living or dead, is not a party to a criminal prosecution, conducted by the state, to punish the injury.

As legal rules now stand, the question, where the uncommunicated threat is not of the *res gestæ*, is simply, whether or not the courts shall create an exception to the rule which excludes hearsay evidence. We do not, in this article, say that they should not. But this is the question,—this, and only this. Why, then, seek for sophisms to conceal the real point at issue? J. P. B.

BOOK NOTICES.

NEVADA STATUTES.—The Statutes of Nevada, passed at the Eighth Session of the Legislature, 1877; begun on Monday, the first day of January, and ended on Thursday, the first day of March. Carson City: John J. Hill, State Printer. 1877.

This is a well printed and well bound volume of 382 pages. It has a good index. It also contains the constitution of Nevada. Most of the laws contained are special laws—laws for the incorporation of towns, relief of individuals, etc.; but it contains considerable general legislation of a useful nature.

LAWYERS' COMMON-PLACE AND BRIEF BOOK, with a Method of Common-Placing an Alphabetical Index of about Three Thousand Titles and Subjects, together with an Index to Cases. By G. L. BARBER, of the Chicago Bar. Chicago: E. B. MYERS, Law Bookseller. 1877.

The "Index of Subjects" is the valuable feature of this book. It contains over three thousand legal subjects. This will make it one of the most useful of blank books for law students to use in making notes of their lectures, since a full index can be made of the subject of each lecture, and of the various topics contained therein. By the use of this blank book, each law student may make his notes of his law lectures a book of as ready and convenient reference as any text book; whereas the usual method is to take down the substance of the lecture and the references to cases in an ordinary blank book, which can not be indexed, thus rendering their notes of little practical utility to themselves or others. We would invite the special attention of students and law professors to the value of a blank note-book for preserving their lectures with a full "Index of Subjects."

The "Method of Common-Placing" is exactly the method a lawyer in actual practice would adopt.

The blank "Index to Cases" enables the book to be used by the practicing lawyer as a "Law Docket" to keep the history of proceedings in cases, and as a Brief Book, in which to preserve memoranda of important decisions and points of his briefs. It is a handsome quarto (9 by 12 inches), printed upon super paper, firmly bound, and furnished for $4.00 net.

NOTES OF RECENT DECISIONS.

PROMISSORY NOTE—NEGLIGENCE IN SIGNING—BONA FIDE HOLDER.—*Ross v. Doland.* Supreme Court of Ohio. To appear in 29 Ohio St. 473. Opinion by MCILVAINE, J. 1. In an action against the maker, by a *bona fide* indorsee, before due and for value, of a negotiable promissory note, the defendant is liable, if guilty of negligence in the execution thereof, although he did not intend to sign a note, and was induced, through fraudulent representations as to its character, to believe that the instrument executed was one of a different purport. 2. A person who negligently signs and delivers to another a printed form of a negotiable promissory note containing blanks, without knowing it to be such, is estopped, as against a subsequent *bona fide* holder for value and before due, from denying authority in the person to whom it was delivered to fill the blanks.

PROMISSORY NOTE—DEFENSE OF FRAUD.—*De Camp v. Hamma.* Supreme Court of Ohio. To appear in 29 Ohio St. 467. Opinion by MCILVAINE, J. In an action against the maker, by an indorsee of a negotiable promissory note, who purchased the same for a valuable consideration, before maturity, and without notice of any fraud or infirmity as between the original parties, the defendant is not liable where it is shown: 1. That at the time of signing and delivering the note, he was induced, by fraudulent representations as to the character of the paper, to believe that he was signing and delivering an instrument other than a promissory note. 2. That his ignorance of the true character of the paper was not attributable, in whole or in part, to his own negligence in the premises.

VENDOR AND PURCHASER—CONTRACT CONSTRUED—SPECIFIC PERFORMANCE—LACHES.—*Fitch v. Willard* 73 Ill. 92. Opinion by SCHOLFIELD, J.—1. A clause in a contract for the sale of land, that the vendor is to furnish a satisfactory abstract of title, and give a quit-claim or special warranty deed, upon the tender of which the cash payments are to be made, implies no undertaking as to the character of title to be conveyed, but, on the contrary, shows that the vendor assumes no responsibility as to the title any further than it may have been affected by his own acts. 2. On bill by a purchaser of land for specific performance, filed over five years after the making of the contract, during which time he never offered to perform on his part, it was *held* that his *laches* was such as to preclude his right to relief, unless satisfactorily explained. 3. Where the vendor of land assumes no responsibility as to his title, and is to make only a quit-claim or special warranty deed, but is to furnish a satisfactory abstract of title, the purchaser, for a reasonable objection to the title, may elect whether he will accept a conveyance. If he elects to take it under a contract which is unilateral, any delay on his part in complying with its terms will be regarded with especial strictness. The fact of objection to the title in such a case does not justify any great delay on the part of the purchaser in performing.

TRUSTEE'S SALE—INSUFFICIENCY OF NOTICE—TRUSTEE PURCHASING—PURCHASER TRANSFERRING NOTE AND TRUST DEED—TRUSTEE'S DEED, FAILURE TO RECORD—REQUESITES OF.—*Farrar v. Payne,* 73 Ill. 82.* Opinion by SHELDON, J.—1. Where a power

*From advance sheets furnished by the Reporter.

of sale was given in a trust deed upon default of payment, *after having advertised such sale ten days* in a public newspaper published in Chicago, and the only evidence to show an insufficient notice was a recital in the trustee's deed that he had duly advertised the property for sale "by publishing a notice in a newspaper published in the city of Chicago aforesaid, *ten days* before the day of such sale, *in the manner prescribed in and by said mortgage deed:*" *Held*, that this recital was not sufficient evidence to impeach the sale, on bill in equity, after the lapse of fifteen years, and after the rights of purchasers had attached, by excluding the idea that the sale was advertised for ten days, as required by the trust deed. 2. Where the regularity of a sale under a trust deed is attacked fifteen years after it happened, and the land has passed into the hands of remote purchasers, the sale should be defeated because the trustee, in the recitals of his deed of the notice given by him of the sale, may have employed language which fails in precision, or is ambiguous; but it must be made to appear, with reasonable certainty, that the requisite notice was not given. 3. The fact that a trustee is a purchaser, through another, at his own sale, will not render the sale void. It is only ground for setting aside the sale in equity while in the trustee's hands, but not after its transfer to a *bona fide* purchaser without notice of the equity. 4. Where the proceeds of the sale amount to less than the note secured, the transfer of it, without any credit being endorsed, and the deed of trust, by the purchaser, on a conveyance of the premises by

him, affords no ground for setting aside the sale otherwise fairly made, and the grantee will not be estopped by taking such assignment of the note and trust deed, from showing a sale under the power. 5. As a trustee's deed, executed under a power of sale in a trust deed, relates back to the execution of the deed of trust, the law does not require that the same shall be recorded when the trust deed is recorded, in order to protect the grantee against attaching creditors of the original owner and those claiming under them. The notice of sale is all that is required. The record of the trust deed is sufficient to put all persons on inquiry as to whether a sale has been had under the same. 6. The fact that a deed of trust fails to show when the note thereby secured matures, will not affect the title acquired under it, as in favor of the purchaser of the equity of redemption, as it may be ascertained when it matures by inquiry of the holder.

ANCIENT DEEDS—PRESUMPTION AS TO TIME OF DELIVERY OF DEED—DECREE, AS EVIDENCE IN A COLLATERAL PROCEEDING—PROOF OF HEIRSHIP.—*Whitman v. Henneberry*. 73 Ill. 109. Opinion by CRAIG, J.—1. Deeds more than thirty years old are called ancient deeds, and they are admitted in evidence without proof of execution; but, before this can be done, it must appear that the instrument comes from such custody as to show a reasonable presumption of its genuineness, and facts and circumstances must be proven which will establish the fact that the instrument has been in existence the length of time indicated by its date. 2. Indorsements or memoranda upon the deed may be considered as circumstances indicating that it is genuine, when they are of such a character as to satisfy a cautious and discriminating mind that they would not be there had the paper been a forgery; and if it be established that the deed had been on record for over thirty years, this will be a strong fact in its favor, although it may not have been recorded in the place required by law. 3. Where a deed was shown to have been in existence for over fifty years, and in the custody of the grantee and his heirs, who were claiming the land under it, and who paid the taxes on it from year to year, and it also appeared that it was recorded, in 1820, in the proper office, it was *held* that the proof was ample to admit the same in evidence as an ancient deed. It is not necessary that the party claiming under such deed should take actual possession of the land to entitle the same to be read in evidence. 4. While it is true that a deed will be presumed to have been delivered on the day it bears date, yet the presumption is not conclusive, but may be overcome by proof. 5. Where a deed from the patentee of a tract of military bounty land bearing date prior to the issue of the patent, contained a recital of the patent, its date, the land granted by it, and the name of the person to whom granted, and the certificate of acknowledgment was dated after the issue of the patent, and the proof tended strongly to show that the grantee in the deed did not, in fact, purchase the land until after the patent was issued: *Held*, that the proof was sufficient to show that the deed was not delivered until the patent issued, and therefore the deed was not void. 6. Where the court has jurisdiction of the subject-matter and of the persons of those interested in a proceeding for the partition of lands, the decree and proceedings will be admissible in evidence to establish a link in the chain of title in an action of ejectment, notwithstanding there may be error in the proceedings. 7. Where title to land is deduced through a decree of partition to divide the land between the heirs of a deceased owner, the adjudication of the court having jurisdiction, finding who were the heirs-at-law of the deceased owner, is *prima facie* evidence of who were the heirs and owners of the land whose interests were decreed to be sold; and in an action of ejectment brought by such purchaser against a stranger to the partition suit, the plaintiff is not bound to produce evidence of heirship outside of such decree, in the absence of proof to the contrary. The doctrine that judgments and decrees are evidence only in suits between parties and privies, has no application to such a case.

PROMISSORY NOTES—NEGOTIABILITY.—In *Woods v. North*, Supreme Court Pa., 24 Pittsb. L. J. 202, the following note was held not negotiable:

"$377.00.

"HUNTINGDON, Pa., May 5, 1875.

"Sixty days after date I promise to pay to the order of W. H. Woods, at the Union Bank of Huntingdon three hundred and seventy-seven dollars, *and five per cent. collection fee if not paid when due*, without defalcation. Value received.

"SAMUEL STEFFEY."

SHARSWOOD, J., in delivering the judgment of the court, said: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, and not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained in all its rigor. Applying it to the note sued upon in this case, we are of opinion that it violates the rule. If it had been made payable at sixty days with five per cent. it would have been objectionable as usurious on its face. It would not, however, on that account have invalidated the note or destroyed its negotiability. A negotiable note may be made payable with interest from its date, and if more than lawful interest is stipulated for, it does not, in Pennsylvania, make the contract void, but only the usury. Hence, such a note is sufficiently certain. It is payable at maturity with lawful interest. But in the paper now in question there, enters as to the amount an undoubted element of uncertainty. It is a mistake to suppose that, if the note was unpaid at maturity, the five per cent. would be payable to the holder by the parties. It must go into the hands of an attorney for collection. It is not a sum necessarily payable. The phrase 'collection fee' necessarily implies this. Not only so, but this amount of percentage can not be arbitrarily determined by the parties. It must be only what would be a reasonable compensation to an attorney for collection. This in reason and the usage of the legal profession depends upon the amount of the note. Five per cent. would probably be considered by a jury as a reasonable compensation upon the collection of a note of three hundred and seventy-seven dollars. But if it were three thousand dollars they would probably think otherwise, and certainly so if it were thirty thousand dollars. How, then, can this note be said to be certain as to its amount, or that amount unaffected by any contingency? Interest and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not alter its negotiability. Neither does a clause waiving exemption; for that in no way touches the implicity and certainty of the paper. But a collateral agreement, as here, depending, too, as it does, upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may be well characterized, like an agreement to confess a judgment was by Chief Justice Gibson, as 'luggage,' which negotiable paper, riding as it does, on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the

first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties; contention and litigation result. It is the best rule, *obsta principiis*. Judgment reversed."

ABSTRACT OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

MUNICIPAL CORPORATION—CONTRACT FOR PUBLIC WORK—DECISION OF CITY ENGINEER.—*Omaha v. Hammond.* Error to U. S. Circuit Court for Nebraska. Opinion by Mr. Justice MILLER. The city of Omaha engaged the plaintiff to construct two wells of certain dimensions, "the whole to be completed under the supervision and to the satisfaction of the chief engineer of the fire department of said city." For this work the city was to pay plaintiff "one hundred dollars for each and every one thousand gallons of water which each of said wells shall be capable of producing, and shall produce, within twenty-four hours, the capacity of said wells to be tested by the chief engineer of the fire department of the city of Omaha aforesaid. And upon the report of said officer being made to the council of said city, showing that the wells are completed and satisfactory, and also showing the amount of water that said well or wells will produce in twenty-four hours, the said party of the first part shall be entitled to and shall receive from the said party of the second part the said sum, to be paid in city warrants." The plaintiff proved the construction of the wells under the supervision of the engineer to his entire satisfaction, and his final acceptance of them. But the city resisted payment on the ground that the wells were not completed according to the specifications. *Held*, that the defence was not a good one. The city was concluded by the action of the engineer in accepting the work.

FOLLOWING TRUST FUNDS—INSOLVENCY—PREFERENCE OF THE UNITED STATES.—*Bayne v. United States.* Appeal from U. S. Circuit Court, District of Maryland. Opinion by Mr. Justice DAVIS. Where a government disbursing officer fraudulently and collusively withdraws public moneys from the designated depository and transfers them to a firm of traders who afterwards become insolvent, such moneys are held to remain the property of the United States, and they are entitled to a preference therefor over other creditors. The learned Justice said: "Government funds in a public depository can only be lawfully withdrawn by a disbursing officer to meet the legitimate requirements of the public service. The money in question was applicable to a specific purpose, and diverting it, as was done in this case, to any other, was a criminal misappropriation of it. Even its transfer to another depository, although no private interest was to be thereby subserved, was forbidden by an explicit and peremptory general order of the paymaster-general. We are fully satisfied by the proofs that the transactions between Paulding, the Merchants' Bank, and the First National Bank, were the result of a fraudulent purpose to secure to Bayne & Co. the use of the public money. The firm received it with a full knowledge that it belonged to the United States, and had been obtained in manifest violation of the act of Congress. The law imposes on the firm an obligation, and implies a promise on its part to refund the money. Such a promise can be enforced by action. Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to pay. Moses v. MacFarlen, Burr (K. B.), 1012. Bayne & Co. are indebted to the United States within the meaning of the act of Congress. The form of the indebtedness is immaterial; it may be legal or equitable. Lewis, trustee, v. United States, 92 U. S. 618. The government being entitled to a preference and priority of payment from the assets of its insolvent debtors, the bill in this case was, in our opinion, properly sustained."

SALE OF GOODS ON CREDIT TO FRAUDULENT INSOLVENT—RIGHT OF VENDOR TO RECLAIM.—*Donaldson, Assignee, v. Farwell.* Error to U. S. Circuit Court, Eastern District of Wisconsin. Opinion by Mr. Justice DAVIS. Mann, of whom the plaintiff is assignee in bankruptcy, bought goods of Farwell & Co., knowing himself to be insolvent, and with the fraudulent purpose of using them in paying his other creditors. The defendants, as soon as they discovered his insolvency, seized such of the goods as they could find, and the assignee in bankruptcy brought this action for their value. The circuit judge gave the following instructions: "The sale made by the defendants passed the title in the property to the bankrupt, but it passed a defeasible title,—that is to say, it could be rendered inoperative at the instance of the vendors, Farwell & Co. If the bankrupt retained the property at the time of the filing of the petition in bankruptcy, the title passed to the assignee, and, as we think, the weight of authority is that it passed as a defeasible, and not as an absolute title, with the right still on the part of the vendors to reclaim the property, provided it was done within a reasonable time after the sale, and after knowledge of the fraud which had been perpetrated." *Held*, no error. "The instructions present the questions of law arising upon the facts and underlying this controversy. The doctrine is now established by a prepounderance of authority that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. Byrd v. Hall, 2 Keyes, 647; Johnson v. Monell, Ib. 655; Noble v. Adams, 7 Taunt. 59; Kilby v. Wilson, Ryan & Moody, 178; Bristol v. Wilsmore, 1 Barn. & Cres. 513; Stewart v. Emerson, 52 N. H. 301; Benjamin on Sales, sec. 440, note of the American editor."

FRAUDULENT CONVEYANCE BY HUSBAND TO WIFE—COLLUSIVE DECREE—ASSIGNEE IN BANKRUPTCY.—*Humes, Assignee in Bankruptcy of John W. Scruggs, v. Mrs. Scruggs et. al.* Appeal from U. S. Dist. Court, North. Dist. Ala. Opinion by Mr. Justice HUNT. 1. If a wife puts money belonging to her separate estate into her husband's business, it becomes his, so far as the rights of his creditors are concerned. 2. A conveyance of property by the husband to the wife, to satisfy his indebtedness to her thus created, he being at the time insolvent, is void as to his creditors. 3. A collusive decree, obtained at the suit of the wife against the husband, confirming such conveyance, is also void as to persons not parties to it, and is not estopped against the husband's assignee in bankruptcy. "But without reference to these indications of collusion," said the learned Justice, "we are of the opinion that a decree between these parties alone can not bind the assignee in bankruptcy. The principle is well settled that a judgment binds only the parties to it and their privies. Bank v. Hodges, 12 Ala., 118, was a decision upon a case very similar to the one before us. In Mutual Benefit Life Ins. Co. v. Tridale (91 U. S. R.) the principle is thus laid down: 'The books abound in cases which show that a judgment upon the precise point in controversy can not be given in evidence in

another suit against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases, and to public judicial proceedings which are of the nature of judgments in rem.' Many cases are cited in illustration of the principle. This decree no doubt concluded Mr. Scruggs on the question of fraud. But he was already concluded by his deed, and we do not see that the estoppel by the decree is any more conclusive than that by the deed. Neither of them affect the assignee in bankruptcy, who is expressly authorized by the bankrupt act to attack any transfer made by the bankrupt in fraud of his creditors.—(Sec. 14.) * * * If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He can not retain it until bankruptcy occurs and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband. Fox v. Meyer, 54 N. Y. 125, 131· Savage v. Murphy, 34 N. Y. 308; Babcock v. Gokler, 24 Ib. 623; Robinson v. Stewart, 10 Ib. 190; Carpenter v. Roe, Ib. 227; Hard's Lessees v. Longworth, 11 Wheat. 199. Fraud or no fraud is generally a question of fact to be determined by all the circumstances of the case. If the husband, in a state of absolute bankruptcy, conveys to his wife property fairly worth $15,000 to $20,000, with no present consideration passing, but with a recital of past indebtedness to her to less than a fifth of its value, the transaction is fraudulent and void as to creditors.—(Authorities *supra.*)"

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

January Term, 1877.

(Filed June 22, 1877.)

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

PROBATE—WILLS.—The terms of the constitution and the statute conferring jurisdiction on the county courts, clearly manifest an intention to provide that the county courts shall exercise exclusive jurisdiction in the probate of wills, and a court of chancery has no power to interfere in reference thereto. Opinion by CRAIG, J.—*Weld v. Sweeny.*

GARNISHMENT—EXEMPTION.—Under the statute providing that the wages of a defendent, being the head of a family, and living with them, to an amount not exceeding twenty-five dollars, shall be exempt from garnishment, the law requires the party who is garnished to disclose the fact that his creditor was the head of a family, and claim for him the exemption allowed by law.—*C. & A. R. R. Co. v. Ragland.*

PROBATE—WILLS—ATTESTING WITNESSES.—Evidence of other witnesses besides the attesting witnesses is not admissible to prove facts necessary to establish a will. The law requires two witnesses, who were present at the time of the making of the will and signed their names thereto, to testify to the sanity of the testator; and if either of them fails to testify thereto the will shall not be admitted to probate, notwithstanding there may be others who are willing to swear to that fact. Opinion by SCHOLFIELD, J.—*Weld et al. v. Sweeny et al.*

ATTACHMENT.—Where plaintiff brought suit in assumpsit and at the same time sued out a writ of attachment in aid of the former, which was levied on property of defendant, the defendant making defense to the writ of attachment, but none to the suit in assumpsit, the plaintiff obtaining judgment thereon by default, on an appeal to reverse the judgment against the defendant because it was rendered while he was in court making defense to the writ of attachment; *held*, that there was no error in such a proceeding, the two branches of the suit being distinct and independent. Opinion by SCOTT, J.—*Schulenberg v. Farwell.*

ESTOPPEL.—The doctrine of estoppel *in pais* is to prevent injuries arising from acts or declarations which have been acted on in good faith, and which it would be inequitable to permit the party to retract. In order to create such an estoppel the party estopped must have induced the other party to occupy a position he would not have occupied but for such acts and declarations. *Held*, that where a creditor fails to bring suit against an administrator of his debtor, deceased, or against his surviving partner, it being a partnership debt, for the space of two years after death of debtor, no estoppel is created within the above rule. Opinion by SCOTT, J.—*Ball et al. v. Horten.*

MALICIOUS PROSECUTION—PROBABLE CAUSE.—Where defendant's hogs were stolen from him, and he learned facts which led him to believe that plaintiff was the thief, which facts he laid before the prosecuting attorney, who advised him not to prosecute, but upon finding another witness who communicated to him facts which he professed to be willing to testify to, and upon going with him before the prosecuting attorney, the latter advised a prosecution, which, however, resulted in an acquittal, the witness failing to testify to anything material; *held*, there was evidence of probable cause for bringing the action, and defendant was not liable in damages. Opinion by WALKER, J.—*Anderson v. Friend.*

DAMAGES—OPENING ROAD.—Where, under the provisions of the statute, a petition is filed with the board of county commissioners for the opening of a road, and they appoint a jury of six to assess the damage, the party whose property is to be taken demanding a jury of twelve, and, upon filing the report, appealing to the circuit court, where the damages are assessed by a jury of twelve; *Held*, that, although under the constitution the party whose property was to be taken might be entitled to a jury of twelve men, yet by appealing to the circuit court, where a trial was had *de novo*, and where objection as to the number of jurors is not made, mere technical objections in the inferior tribunal will not be considered on the record to deprive the circuit court of jurisdiction. Had defendant not appealed, and had he contested the validity of the proceedings of the board by an action of trespass on the road authorities proceeding to open the road, then he could have raised this question; but he has waived it in this proceeding. Opinion by WALKER, J.—*Williamson v. The County of Cass.*

FORECLOSURE—NECESSARY PARTIES.—Where bonds of a company are issued, secured by a trust-deed containing power of sale, to a trustee for such parties as should become owners of the indebtedness, and default is made and the property is advertised and sold to B, who filed a bill against the trustee for specific performance of the sale, a decree to that effect being made on a bill filed by one of the owners of the indebtedness to set aside the decree in the original suit; *Held*, 1. That the owners of the indebtedness were necessary and indispensable parties to the suit brought by B for a specific performance of the sale, they alone being affected by the decree, and the trustee having no real interest in the premises. 2. That a decree setting aside the decree in the original suit, and declaring the deed made under it null and void, is erroneous, the proper practice being to open the decree complained of, and to let in the aggrieved party to make his defense. Opinion by SCOTT, J., reversing.—*Gates v. Franklin Savings Bank.*

NOTE—FORGERY—SURETYSHIP.—Judgment was obtained against A, B and C, upon a note purporting to be made by them. Execution issued upon the judgment and it was levied upon the property of B. Afterwards, by direction of the payee of the note, the sheriff released the property from the levy, and levied instead upon the real estate of C. The latter now files this bill to enjoin the sale of the property under the execution. Proof shows that C refused to sign the note unless A obtained the signature of B, whereupon A forged B's signature thereto, and showed it to C, who signed the note, but who now claims that the forgery releases him from liability. *Held*, that the property

of B was rightfully released from the levy, his signature to the note being shown to be a forgery; *held*, that this forgery does not operate in discharge of C, and entitle him to have his property exempted from sale on the execution, the holders of the note being innocent purchasers for value. Opinion by SHELDON, C. J.—*Stoner v. Milliken et al.*

ACTION ON THE CASE—REMOTE DAMAGES RESULTING FROM FRIGHT.—Where the defendant came to the house of plaintiff's husband, while the plaintiff was in bed, and raised a disturbance on the porch, next to the room where plaintiff was lying, used violent language towards plaintiff's husband and his (defendant's) little boy, who had been working at the house, threatened to take the life of plaintiff's husband, raising a knife to strike him, talked in a loud and violent tone, there being no proof that defendant knew that plaintiff was so near him or was in a delicate condition, the plaintiff being at the time about eight months gone in pregnancy, and being found shortly afterwards suffering severe pain, after which she gave birth to a dead child, caused by fear growing out of the violence of defendant; *held*, that the damages are too remote, not being such a natural and proximate consequence of defendant's conduct as to make him liable therefor. Opinion by SHELDON, C. J., SCOTT, J., dissenting.—*Phillips v. Dickerson.*

SPECIFIC PERFORMANCE—PAROL CONTRACT TO CONVEY LANDS.—1. Although in order to take a case out of the application of the statute of frauds, it is necessary that a parol contract to convey should be clear and certain in its terms, and established by testimony of an undoubted character, which is clear, definite and unequivocal, yet, where the plaintiff takes possession of the land, cultivates and improves it, there being proof of other acts showing the existence of a parol contract, and where it is testified by some of the witnesses that they heard defendant say he had given the land to plaintiff's wife, who was defendant's daughter, and by others that they had understood him to say he had given it to plaintiff, yet this discrepancy in the evidence does not militate against the real equity of the complainants. 2. *Held*, that a party obtaining a deed of property before the filing of this bill, from the legal owner, is not, under the circumstances, entitled to hold as an innocent purchaser for value. The plaintiff was in possession of the premises at the time the deed was made, and his possession was constructive notice to the purchaser of his rights to the property. Opinion by CRAIG, J.—*Langdon v. Bates.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

MUNICIPAL OFFICERS—SALARY OF POLICEMAN.—Where the mayor of a city has power to suspend a policeman, and does suspend him, the policeman has no right to act as such, and has no cause of action against the city for his salary during the time he is so suspended. Auditor of Wayne Co. v. Benoit, 20 Mich. 176; Primm v. Carondelet, 23 Mo. 22; State *ex rel.* Attorney-General v. Davis, 44 Mo. 131. Opinion by HENRY, J.—*Westberry v. Kansas City.*

STOCKHOLDER'S LIABILITY FOR DEBTS OF CORPORATION.—The constitutional amendment adopted in 1870 extinguished the "double liability" clause of the constitution of 1865, and leaves the common-law liability of the stockholder for the stock owned by him, and any amount unpaid thereon, unaffected by either constitutional provision. Ochiltree v. Iowa Railroad Contracting Co., 54 Mo. 113. Opinion by HOUGH, J.—*Schricker et al. v. Ridings.*

ACTION AGAINST CORPORATION—SERVICE.—Under sec. 26, Wag. St. 2941, and sec. 27, p. 2941, a return that the officer served the writ by leaving a copy at the office "with A. W. D., the person having charge thereof in the absence of the president or chief officer of the defendant," is insufficient. The absence contemplated by the statute is an absence from the county and not from the office, and the return should aver the absence from the county. Opinion by HENRY, J.—*Hoen v. A. & P. R. R. Co.*

EVIDENCE—CHARACTER.—Except in suits for slander, seduction, etc., where the character is put in issue directly and is of especial importance in the suit, it is error to admit evidence of the good character of a party, when no attempt has been made to impeach his character by evidence offered by the adverse party, and for such error the judgment will be reversed. Porter v. Seiler, 23 Penn. St. 424; Fowler v. Ætna Ins. Co., 6 Cowen, 674; Humphreys v. Humphreys, 7 Cowen, 216; Lough v. St. John, 16 Wend. 646. Opinion by HENRY, J.—*Dudley v. McCuer.*

HUSBAND AND WIFE—WITNESSES.—In a suit by husband and wife, if either is but a nominal party, only the other can testify, except that, where one is the agent of the other in the transaction, the agent is a competent witness. Sec. 5, p. 1372 Wag. Stat. specifies the cases in which the wife may testify, whether joined with her husband or not, but makes no exception in favor of the husband, and if but a nominal party to a suit prosecuted for her benefit, he could not testify; but by the act of 1875 he is competent where he was the wife's agent. 54 Mo. 288; 53 Mo. 575; 57 Mo. 95; 60 Mo. 420. Opinion by HENRY, J.—*Haerle and Wife v. Krishn.*

LAND AND LAND TITLES—SWAMP LANDS.—Where lands were selected as swamp lands under the act of Congress of September, 1850, and the selection was approved by the secretary of the interior, and a list containing such land was certified by the commissioner of the general land office to the governor of Missouri, and a patent was subsequently issued to the state therefor, the grant was valid without a patent, and a deed from the state is a better title than a patent from the United States issued upon a location and settlement under the preemption laws of the United States, and an entry at the land office made *after* the selection and certification of the lands as swamp lands. Opinion by HOUGH, J.—*Masterson v. Marshall.*

COUNTY WARRANTS—PRACTICE.—County warrants are not assignable except in the form prescribed by statute, and when, after judgment in favor of the holder, where the petition did not allege, and the evidence did not prove such an assignment, there is no legal presumption in favor of it, and the judgment will be reversed. The warrant is evidence of indebtedness, whether drawn on a general or special fund, and, if not paid, the legal owner thereof is entitled to judgment without alleging or proving that there were funds on hand for the payment thereof. Howell v. Reynolds Co., 51 Mo. 152, is cited and overruled. Opinion by SHERWOOD, J.—*International Bank v. Franklin Co.*

LIABILITY OF RAILROAD COMPANY FOR DEATH OF EMPLOYEE, CAUSED BY THE TRAINS OF COMPANY.—The deceased was employed by the railroad company as a day laborer, and at the time he was killed was engaged in ditching. The train which caused his death was a construction train, and was used to carry the ditchers to and from their work, and in removing dirt, etc. The cases of McDermott v. Pac. R. R. Co., 30 Mo. 515; Miller v. A. & P. R. R. Co., 63 Mo., and Proctor v. Kan. & St. Joe R. R. Co., 63 Mo., are decisive of every question raised in this case. The company is not responsible for the injury to a fellow-servant by its servants. *Per Curiam.—Hepner and Wife v. A. & P. R. R. Co.*

TRUST AND TRUSTEES—ACCEPTANCE OF TRUST.—Where a trustee in a deed of trust (having a copy of the deed in his possession) has stood on the record as trustee for six years without having done any act to disclaim the acceptance of the trust, his acceptance thereof will be presumed without any express declaration of it, and he can not purchase the trust property for himself, either privately or at a judicial sale. Jewett v. Miller, 10 N. Y. 402; Kellogg v. Wood, 4 Paige Ch. 579; Van Epps v. Van Epps, 9 Paige Ch. 238. Notice of the existence of the trust as against a purchaser from the trustee, may be either by the record of the trust-deed, or by facts and circumstances tending to prove that he knew of it, or by both. Opinion by HENRY, J.—*Roberts v. Mosely et al.*

OFFICIAL BOND—TITLE OF OFFICER—VARIANCE.—The General Assembly, in various acts amendatory of the original act by which "the Kansas City Court of Common Pleas" was organized, limited the jurisdiction of that court to Kaw Township, and made the Marshal of Kan. City "Marshal of Kansas City Court of Common Pleas" and "Marshal of Kaw Township," interchangeably, and in 1859 created the office of "Marshal of the Kansas City Court of Common Pleas." In an action against this officer and his securities for a breach of the conditions of his official bond, the fact that the bond was given for the performance

of his official duties as "Marshal of Kaw Township," instead of "Marshal of the Kansas City Court of Common Pleas," is no defense. There was but one office, one officer and one bond, and the statutes designated this officer by both official titles. Opinion by SHERWOOD, J.—*State to use of Watkins v. Miserey et al.*

PRACTICE — GENERAL JUDGMENT ON PETITION CONTAINING SEVERAL COUNTS.—It is settled law in this state that this court will not reverse a general judgment rendered on a petition containing several counts (and no separate findings on them), unless the error was specifically pointed out in the court below by appropriate motion, nor for any error not so specifically pointed out, unless there be "error apparent on the face of the record *materially affecting the merits of the action.*" The statute excepts two errors, to wit, "that the petition does not state facts sufficient to constitute a cause of action," and that "the court had no jurisdiction of the subject-matter of the action;" and it is a mistake to suppose that this court will, as a matter of course, reverse "for error apparent on the face of the record," except where it appears that such error "materially affects the merits of the action." On motion for rehearing. *Per Curiam.—Sweet, Adm'r, v. Maupin.*

ACTION AGAINST RAILROAD COMPANY FOR DAMAGES FOR INJURY TO THE PERSON—CONTRIBUTORY NEGLIGENCE.—The railroad track and a public road ran parallel, 25 or 30 feet apart, for a distance of several hundred yards, to a crossing, over which was a sign-board with the notice, "Railroad crossing—look out for the cars," in large letters. The plaintiff, who lived in the vicinity, drove his wagon westward to the crossing, and in going over the track was struck by a train going in the same direction. The plaintiff himself testified that if he had looked in the direction the train was running he could have seen the train in time to have avoided the accident, but that he did not look. *Held*, that these facts being clearly proved, it was error in the trial court not to instruct the jury that plaintiff's contributory negligence prevented him from recovering, although the bell was not rung nor the whistle blown. Where there is no controversy about the facts, negligence is a question of law for the court. *Fletcher v. A. & P. R. R. Co.*

INDICTMENT — INSTRUCTIONS — DUTY OF THE COURT.—In murder cases, where the evidence discloses facts from which the jury might reasonably have found the defendant guilty of manslaughter, and the court gave instructions upon the law of murder in the first and second degree only, it was error not to instruct as to the law of manslaughter, *although no instructions were asked upon* that grade of crime. State v. Ware, 62 Mo. 597; State v. Jones, 61 Mo. 232. Where part of a conversation had with defendant immediately after the killing was put in evidence by the state, defendant is entitled to prove all such conversation, although in the course of it he had been advised by a justice of the peace not to talk any more about it, and it was error to exclude what was said after this caution was given, the conversation having continued in spite of it. Where the jury agreed to set down their verdict separately at so many years imprisonment, add up the various numbers and divide them by twelve, and that the quotient should be their verdict, this was misconduct for which the verdict should be set aside; but a juror is not a competent witness to prove such action on the part of the jury. Opinion by HENRY, J.—*State v. Branseller.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

PRACTICE.—An order of the district court vacating a judgment rendered on a default, is not such an order as may be reviewed by the supreme court while the suit is still pending in the district court. Case dismissed. All the justices concurring. Opinion by VALENTINE, J.—*Kermeyer v. The Kansas Pacific Railway Company.*

SUIT ON A RECOGNIZANCE.—1. Where a party relies upon the liberal provisions of section 154 of the code of criminal procedure to sustain his petition, he must see that all the matters named therein clearly appear. 2. In such case the petition must affirmatively show that the prisoner was discharged from custody by reason of the giving of the recognizance. Judgment affirmed. Opinion by BREWER, J.; all the justices concurring.—*The State v. Crissy.*

NOTE—ENDORSERS.—1. Whenever a negotiable note is drawn up, and is then signed by the maker thereof, and is then endorsed in blank, first by the payee thereof and then by a third person, and the note is then delivered by the maker thereof for a sufficient consideration to still another person, who thereby becomes the holder thereof, the presumption in such a case should be, and is, that the payee and said third person intended to assume, and did assume, all the rights and privileges, as well as all the obligations and liabilities usually assumed by indorsers of negotiable instruments. 2. Therefore, where a note is executed, endorsed and delivered in the foregoing manner; *held*, that the indorsers will be discharged unless the demand of payment is made and due notice of non-payment given to the endorsers. Judgment affirmed. All the justices concurring. Opinion by VALENTINE, J.—*Bradford v. Nelson et al.*

PRACTICE—ATTORNEY'S FEES.—1. Where M. commences an action in a justice's court against a railroad company under the "act relating to killing or wounding stock by railroads" (Laws of 1874, p. 143), and sets forth in his bill of particulars a good cause of action for $35.00 damages for killing his cow, and then alleges that "$10.0 is a reasonable attorney fee for the prosecution of this suit," and then "prays for judgment against the said defendant for the said sum of $35.00, his damages sustained aforesaid, and $10.00 attorney's fee for the prosecution of this suit, and costs," and in the district court, to which the case was afterwards taken on appeal, the jury find from the evidence the following verdict, to wit: "We, the jury, find for the plaintiff, and assess his damages at thirty-five dollars and ten dollars attorney's fee," and the court renders judgment accordingly upon this verdict, and it appears from the record that the plaintiff was assisted by an attorney; *held*, that the judgment for the attorney's fee of $10.00 will not be reversed where no reason for such reversal can be given, except that said bill of particulars does not state facts sufficient to authorize such a judgment. Judgment affirmed. Opinion by VALENTINE, J.; all the justices concurring.—*The St. Louis, Lawrence & Western Railroad Co. v. Miller.*

LIFE INSURANCE—PAYMENT OF A PREMIUM OF A POLICY WITH NOTE—WHEN A PRINCIPAL IS LIABLE FOR THE FRAUDS AND DECEITS OF AN AGENT.—1. Where the agent of an insurance company, whose business it is to solicit applications for insurance and receive the first premiums, accepts a written application of a person, duly signed, waives the payment in money of the first semi-annual premium, and in lieu thereof takes a promissory note, and thereupon executes and delivers to the assured a receipt, of which the following is a copy:

"I have received from George Roberts, note for thirty-seven 75-100 dollars, for which (provided the application is approved at the home office,) I agree to furnish him a policy upon his life for $2,000 from the New York Life Insurance Company, within fifteen days from date, or if this application shall be declined to return the amount to him or his order on demand, it being expressly understood and agreed that no liability is assumed by the company unless the said risk shall be approved and a policy issued at the home office in New York.

"$37.75. (Signed) G. M. PINKHAM.

"Dated Leavenworth, Kansas, Sept. 17th, 1872."

And within the said fifteen days the application is approved at the home-office and a policy is issued thereon, and sent to the general agent of the company, where the application was taken for the applicant, and, after the death of the assured, the company has proofs of death made out under the policy, accepts them, sends a draft payable to the beneficiary of the policy, delivers such policy to such beneficiary and obtains the same receipted and satisfied, and such beneficiary named in the policy does not obtain such draft on account of the fraud of the agent:—*Held*, that notwithstanding a recital in the policy that it should not be binding until the premium is actually paid in money, and the note is not paid, nor the policy otherwise delivered prior to the death of the assured, the insurance company is liable. 2. An insurance company is liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations and omissions of duty of a general agent in the course of his employment, although the company did not authorize or justify such misconduct. 3. An insurance company is liable to a third person, in a civil

action, for the frauds, deceits and misrepresentations of its general agent, when the acts so committed are apparently within the general scope of his authority, although not so in fact, on the grounds that such general agent was employed in that character of business, and held out by the company as a person authorized by it and fully to be trusted. Judgment affirmed. Opinion by HORTON, C. J.; all the justices concurring.—*The New York Life Ins. Co. v. McGowan.*

VOID TAX DEED — STATUTE OF LIMITATIONS — MORTGAGEE CAN BUY TAX-TITLE — PRACTICE IN SUPREME COURT.—1. A tax deed which shows that the land intended to be conveyed thereby was sold by the county for delinquent taxes on May 5th, 1875, and that the county treasurer, on the 10th day of February, 1863, assigned the tax sale certificate to the person to whom, on May 11th, 1865, the deed was executed, is void upon its face. Short v. Walker, 6 Kan. 65. 2. The fact of possession and claim of color of title in good faith under a tax deed, does not enter into, or constitute an element in the limitation prescribed by section 12, p. 879, Comp. Laws 1862, or by subdivision 3rd, sec. 16, Gen. Stat. 1868, 632-633, to the effect that "an action for the recovery of real property sold for taxes can only be commenced within two years after the date of the recording of the deed. 3. The statute of limitation prescribed by sec. 12, p. 879, Comp. Laws 1862, or by subdivision 3rd, sec. 16, Gen. Stat. 1868, 632-633, will not run in favor of a tax deed, void upon its face, even when the land intended to be conveyed by the tax deed has been in the actual, open and notorious possession of the holder of the void tax deed for two years after the date of the recording of such deed. 4. A mortgagee, not in the possession of real estate, is under no obligation to pay the taxes on the mortgaged premises. Under sec. 135, Gen. Stat. 1868, 1062, if the mortgagor failed or neglected to pay the taxes, or permitted the land mortgaged to be sold for taxes, the mortgagee could pay the taxes, or redeem the land sold, and the taxes so paid were a lien on the mortgaged property until paid back; but this section does not render it the duty of the mortgagee either to pay the taxes or to redeem the land from tax sale. 4. The mere relation of mortgagee will not prevent the person so related from acquiring title to the mortgaged premises by purchase at a tax sale. 5. Where a party brings an action in the supreme court to have a judgment of the district court reviewed, and upon the hearing the alleged errors are held insufficient to reverse or modify the judgment, this court will not examine any errors in the judgment below, at the instance of the defendant in error, when such defendant has made no motion for a new trial and has brought no separate action to have those errors corrected or the judgment reversed. Judgment affirmed. Opinion by HORTON, C. J.; BREWER, J., concurring; VALENTINE, J., not expressing any opinion.—*Waterson v. Devoe.*

PRACTICE—ISSUING RAILROAD BONDS—ACTS OF COUNTY COMMISSIONERS—VALIDITY OF RAILROAD BONDS—FINDINGS OF A COURT.—1. A motion to require a pleading to be made more definite and certain is a part of the record and need not be incorporated in a bill of exceptions. 2. The rule is, that when fraud is charged and made the basis of recovery, a mere general allegation of fraud is insufficient; the facts showing the fraud must be stated. 3. It is generally true that, when an act is obligatory upon a public officer, it is immaterial with what motives he does the act, although thereby an obligation is cast upon the public and the public is bound, although money was paid to the officer to induce him to act, and no cause of action is stated on behalf of the public and against the party in whose behalf the act is done, by an allegation that the act was done in pursuance of a fraudulent and corrupt combination and conspiracy between such party and the officer. And it is also generally true that, when the doing of an act of like effect upon the public is not obligatory, but intrusted to the discretion of the officer, the public is not bound, if the act was induced by the corruption of the officer, and may recover of the party so inducing the act. 4. Where the allegation in a petition in such an action is only in general terms that there was a fraudulent and corrupt combination and conspiracy between such party and the officer, and that the act was done in pursuance of such combination and conspiracy, the party has a right, upon motion, to have the petition made definite and specific by a statement of the facts showing the terms, nature and extent of the conspiracy, and is not compelled to go to trial upon the mere general allegation that there was a combination and conspiracy. 5. Whatever may be individual opinions, it is at the present the settled policy of this state to tolerate the issue by municipalities of bonds in aid of railroads, and the settled law that bonds so issued, if issued in pursuance of express authority and in accordance with the prescribed forms, are valid. 6. While the power to issue railroad aid bonds is not one of the ordinary powers of a county, requires express authority, and must be exercised in conformity to prescribed forms, it is not penal in its nature, and the validity of its exercise does not demand all the strictness of the ancient rules of the criminal law. 7. While it is true that authority to the commissioners of a county to issue railroad aid bonds, upon compliance with certain specified conditions, carries with it no authority to waive any of the conditions, yet, when there is a failure on the part of the railroad company to comply with one of the conditions in some minor respect, and notwithstanding the failure of the the commissioners acting in good faith to issue the bonds of the county, and the failure is in a matter which is of public knowledge, a failure by the county to make any objection or take any proceedings and payment for a series of years of the interest on the bonds, will work a ratification of the action of the commissioners and prevent the county from thereafter recovering of the railroad company the bonds or their value. 8. On February 6, 1867, the qualified electors of Douglas county duly authorized the commissioners to subscribe to the stock of the L., L. & G. Railroad Company, and issue the bonds of the county in payment thereof. Several conditions were prescribed in the authority thus granted, among them one that the company should complete and equip twenty-four miles of railroad track before the 1st of January, 1868. All the conditions were complied with, except that the twenty-four miles were not completed by January 1, 1868, nor for some time thereafter, though the exact time is not disclosed. In July, 1869, the county commissioners issued the bonds and received the stock. In January, 1870, the term of office of the then county commissioners expired; the coupons on these bonds falling due in January, 1870, and January, 1871, were duly paid. No action or proceedings was had by the county in any form to question the validity of the action of the commissioners in issuing the bonds until August, 1871, when this action was brought against the railroad company to recover the value of the bonds. *Held*, that if the commissioners acted in good faith, honestly and in obedience to their unbiased judgment as to the best interests of the county, the action can not be maintained, and if it be claimed that they fraudulently and corruptly combined and conspired with the railroad company to defraud the county, and the issue of the bonds was in pursuance of such combination and conspiracy, the petition should state the facts showing the terms, nature and extent of the combination and conspiracy, and not simply allege in general terms that there was such a combination and conspiracy, and that, if the latter were the only allegation, a motion to make the petition more definite and certain ought to have been sustained. 9. In every case tried by the court there should be a finding in writing, upon which to predicate and rest the judgment, and omission of such finding is error. But doubted whether such error is fatal to the judgment or sufficient to compel a reversal. Judgment reversed. All the justices concurring. Opinion by BREWER, J.—*L., L. & G. R. R. Co. v. Board of County Commissioners of Douglas County.*

NOTES.

NEW YORK has the following stringent law in regard to insurrections: "Whenever the governor shall be satisfied that the execution of civil or criminal process has been forcibly resisted in any county or counties of this state by bodies of men, * * * he may, on application of such officer [officer having the process], or of the district attorney of such county, by proclamation, declare such county or counties to be in a state of insurrection, and may order into the service of the state such number and description of volunteer or uniformed companies or other militia of this state as he shall deem necessary. * * *"(§ 19, chap. II, part IV, vol. 5, New York Statutes at Large.) "Any person or persons who shall, after the publication of such proclamation by the governor, resist the execution in any such county so declared to be in a state of insurrection, * * * or who shall resist any force ordered out by the governor to quell such insurrection, shall, upon conviction, be adjudged guilty of a felony, and punished by imprisonment in the state prison for a term not less than two years."